

THE
REPORTS
OF
Sir EDWARD COKE, Knt.
IN ENGLISH,
IN THIRTEEN PARTS COMPLETE;
WITH
REFERENCES to all the ANCIENT and MODERN
BOOKS OF THE LAW.

Exactly TRANSLATED and COMPARED with the First and Last Edition
in FRENCH, and printed Page for Page with the same.

TO WHICH ARE NOW ADDED,
THE RESPECTIVE PLEADINGS,
IN ENGLISH.

V. O L. II.

The Whole newly REVISED, and carefully CORRECTED and TRANSLATED;
with many additional NOTES and REFERENCES,

By GEORGE WILSON, SERJEANT AT LAW.

L O N D O N,

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10/19/1911 L. B. Handcock

T H E
T H I R D P A R T
O F T H E
R E P O R T S
O F

Sir EDWARD COKE, Knt.

Her MAJESTY'S ATTORNEY-GENERAL,

O F

Divers Resolutions and Judgments given with great Deliberation, by the most Reverend Judges and Sages of the Law, of Cases and Matters in Law which were never resolved or adjudged before: And the Reasons and Causes of the said Resolutions and Judgments, during the most happy Reign of the most illustrious and renowned Queen ELIZABETH, the Fountain of all Justice, and LIFE of the LAW.

With REFERENCES to all the BOOKS of the COMMON LAW, as well Ancient as Modern: And the PLEADINGS in ENGLISH, carefully Revised and Corrected,

By GEORGE WILSON, Serjeant at Law.

In memoria æterna erit justus, & non timebit ab auditione mala.

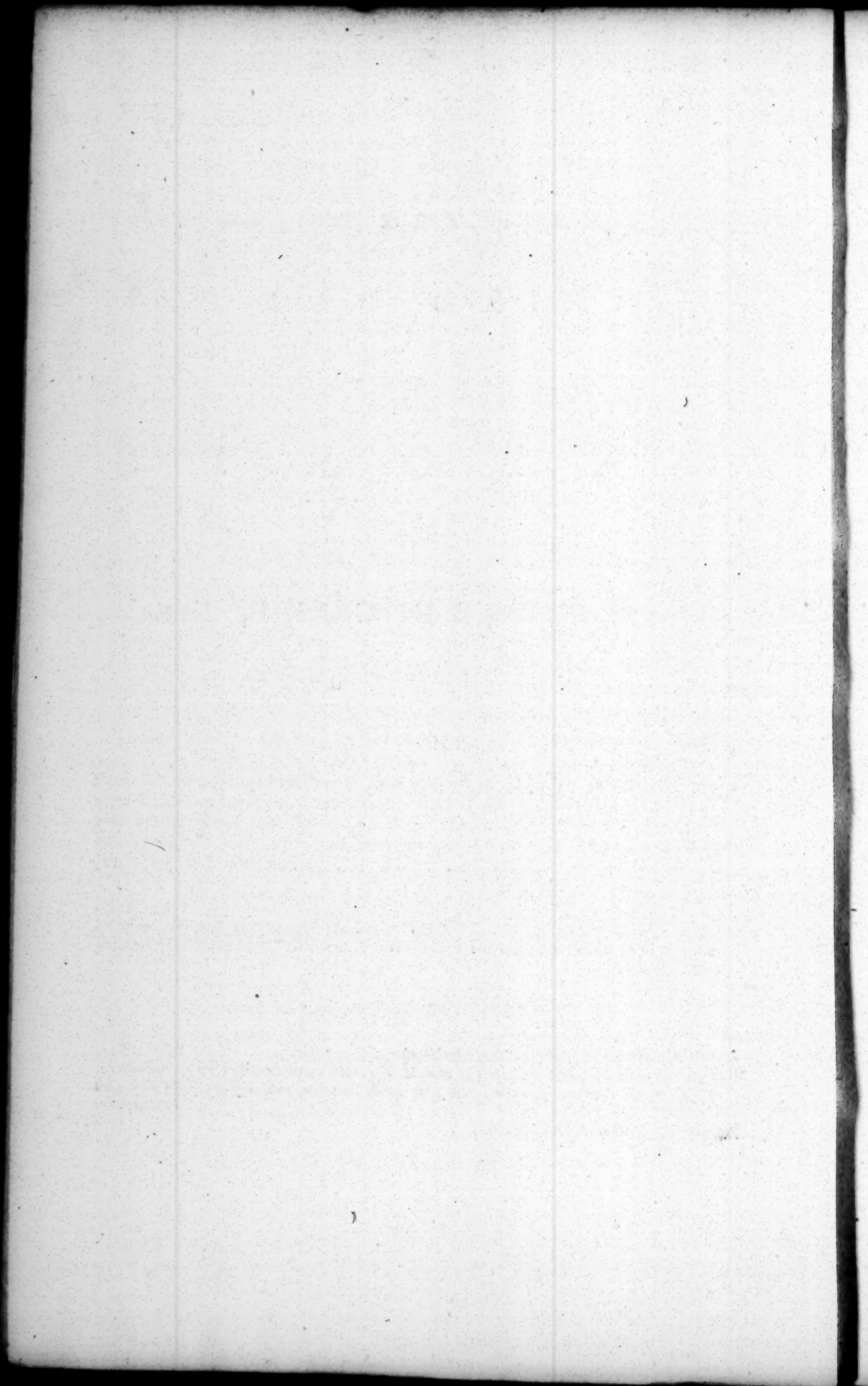
PSALM 105.

Iustitia omnium virtutum princeps est, tuta & fida comes humanæ vitæ; ea enim imperia, regna, populi, civitates reguntur, quæ si de medio tollatur, nec constare possit hominum societas.

ISIDORUS.

Iustitia in sese virtutes continet omnes.

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T O T H E

R E A D E R.

QUAM non utiles modo, sed necessariae planè fuerint iudiciorum & causarum relationes olim editæ, faciliè vel ex duobus hisce argumentis, in aliorum magnâ copiâ, æquo lectori constare potest: primò, quod Reges nostri Edwardus videlicet Ed. 3. Hen. 4. Hen. 5. Hen. 6. Ed. 4. Rich. 3. & Hen. 7. prudentes quatuor & doctos legum professores selegerint & constituerunt, qui reverendissimorum iudicium sententias ac decreta mandarent literis, tum ut solverentur quæstiones dubiæ ex opinionum discre-

HOW profitable and necessary the reports of the judgments and cases in law published in former ages have been, may unto the learned reader, by these two considerations among others evidently appear. First, that the Kings of this realm, that is to say, E. 3. H. 4. H. 5. H. 6. E. 4. R. 3. and H. 7. did select and appoint * four discreet and learned professors of law to report the judgments and opinions of the reverend Judges, as well for resolving of such doubts and questions wherein there was (as in all other arts and

A 3

sciences

* These four reporters I take to be those who have since been named readers, and elected to that office by the respective inns of court.

To the READER.

sciences there often falls out,) diversity of opinions, as so for the true and genuine sense and construction of such statutes and acts of parliament, as were from time to time made and enacted. To the end that all the Judges and Justices in all the several parts of the realm, might, as it were, with one mouth in all men's cases pronounce one and the same sentence; whose learned works are extant, and digested into nine several volumes, wherein if you observe the unity and consent of so many several Judges and courts in so many successions of ages, and the coherence and concordance of such infinite, several, and divers cases, (one, as it were with sweet consent and amity, proving and approving another) it may be questioned whether the matter be worthy of greater admiration or commendation: for as in nature we see the infinite distinction of things proceed from some unity, as many flowers from one root, many rivers from one fountain, many arteries in the body of man from one heart, many veins from one liver, and many sinews from the brain: so without question *Lex orta est cum mente divina,*

pantiâ (id quod in aliis ferè artibus & scientiis usu venit) ortæ; tum ut de vero ac genuino sensu eorum statutorum legumque in comitiis fixarum constaret, quæ de tempore in tempus latæ & sancitæ fuerant; idque eo fine quo Judices ac Justitiæ præsidēs universi, in singulis regni partibus, uno quasi ore idem jus in omnibus omnium hominū causis dicerent. Horum igitur docta sanè opera, extant digesta etiamdum in justa novem volumina: in quibus siquidem conspirantem unitatem & consensum tot tamque adeò diversarum Judicū ac curiarum in tanta successionū & seculorum varietate observaveris, unà etiam & coherentiam atque concordantiam causarum penè infinitarum numero naturā planè disjunctarum animadverteris, quo modo una aliam, dulci quasi harmonia & affinitate amplexetur, probet atque approbet; profectò in dubium vocari poterit, sit ne res admiratione potius, an commendatione majori digna. Quod enim in natura videmus infinitam rerum distinctionem ab unitate aliquā provenire, ut ab eadem radice multos flores,

Now Ten, by
adding May-
nard's Ed. 2.

flores, ab eodem fonte plures rivulos, & in humano corpore ab eodem corde multas arterias, ex uno jecore multas venas, nervos omnes ab uno cerebro, ita proculdubio lex orta est ex mente divina, atque unitas hæc consensus planè admirabilis in tanta rerum diversitate, non nisi a Deo bonarum legum & constitutionum auctore ac fonte dimanavit. Huic argumento accedit & secundum illud ductum a multiplici & jucundo fructu quem ex iisdem hisce libris in æqua justitiæ executione, & tranquillâ ac pacificâ regni hujus administratione jam inde percepimus.

Sunt præterea & relationes aliæ majoribus ingeniis aptæ, paris sanè auctoritatis, sed perspicuitatis fortè minoris; quales sunt causarum formulæ judiciorumque in curiis regiis datorum monumenta, in quibus graves sanè ac difficiles quæstiones, (diligenti prius adhibita deliberatione) maturo consilio judicantur & definiuntur: ita tamen ut non exprimentur judiciorum sententiarumque causæ ac rationes, quandoquidem soleant prudentes & docti viri priusquam judicant qui-

and this admirable unity and consent in such diversity of things, proceeds only from God the fountain and founder of all good laws and constitutions. Secondly, in consideration of the sweet and delectable fruit that hath been reaped by those works for the due administration of justice, and the government of the realm in peace and tranquillity.

Besides these there be reports fit for stronger capacities of equal authority, but of less perspicuity than the other; and these be the judicial records of the King's courts, wherein cases of importance and difficulty are upon great consultation and advisement adjudged and determined, in which records the reasons or causes * of the judgment are not expressed; for wise and learned men do before they judge, labour to reach to the depth of all the reasons of the case in question, but in their judgments

* Yet, see Placita Parliam. Temp. E. 1, 1, and 3, where the reasons, and causes of the judgment are frequently expressed in the record. A method highly commendable.

TO the READER.

ments express not any: and in troth if Judges should set down the reasons and causes of their judgments within every record, that immense labour should withdraw them from the necessary services of the common-wealth, and their records should grow to be like *Elephantini libri* of infinite length, and in mine opinion lose somewhat of their present authority and reverence; and this is also worthy for learned and grave men to imitate. But mine advice is, that whenever a man is enforced to yield a reason of his opinion or judgment, that then he set down all authorities, precedents, reasons, arguments and inferences whatsoever that may be probably applied to the case in question; for some will be persuaded or drawn by one, and some by another, according as the capacity or understanding of the hearer or reader is. These records, for that they contain great and hidden treasure, are faithfully and safely kept (as they well deserve) in the King's Treasury. And yet not so kept but that any subject may for his necessary use and benefit have access thereunto, which was the ancient law

dem rationum momenta ponderare, & in omnes rei controversæ latebras ac recessus inquirere, verum inter judicandum sententiam nudam non causas dicere. Et certè siquidem sententiarum suarum rationes singulis edictis Judices apponerent, & avocaret eos immensus ille labor a necessariis reipub' negotiis, fierentque adedò elephantinorum librorum similes eorum sententiæ infinitam molem excrecentes, denique auctoritatis atque reverentiæ pristinæ (meâ quidem opinione) nonnihil amitterent: dignum itaque hoc est quod imitentur viri docti & graves; utcunque suaserim, quod si quando contigerit ut opinionis judicii que sui rationem quispiam cogatur reddere, omnes tum demum afferat & accumulet auctoritates, omnia exempla, rationes item, argumenta & illationes quas-cunque quæ causæ controversæ probabiliter possint applicari; ita multiplex ratio, alia alium pro cuiusvis lectoris aut auditoris captu trahet & persuadebit. Atque istæ quidem iudicium sententiæ, quia plurimum continent thesauri quasi reconditi, tutò ac fidelitèr, in archivo regio
(idque

(idque merito suo maximo) asservantur: ita tamen interea ut cuius subdito liceat in usum & commodum suum illas adire & consulere, id quod antiqua lege Angliæ cautum fuit, posteaque declaratum & sancitum in magnis comitiis anno 46 Edw. 3. habitis, in hæc verba: Item pria les commons que come recorde & quecunque chose en la court le Roy, de reason devoient demurr' illoques pur perpetual evidence, & eide de tous parties a icelly, & de tous ceux a queux en nul maner ils atteignent, quant mestier leur fuit. Et ja de novell refusent en la court nostre dit seign. de serche ou evidence encountr' le Roy ou disadvantage de luy; que pleise ordeiner per estatute, que serche & exemplification soit faitz as toutz gentz, de queconque recorde que les touche en asc' maner' auxibien de ce que chiet encountre le Roy come autres gentz. Le Roy le voet.

Perutiles etiam sunt & antiqui legum nostrarum libri qui hodie extant, quales Glanvillus, Bracton, Britton, Fleta, Ingham, & Novæ Narrationes, necnon & recentiores alii, upotè Vetus liber Tenorum, Natura Brevium, Littleton, Dia-

of England, and so is declared by an act of parliament in 46 E. 3. in these words: Item pria les commons que come recorde & quecunque chose en la court le Roy de reason devoient demurr' illoques pur perpetual evidence, & eide de tous parties a icelly, & de tous ceux a queux ea nul maner' ils atteignent, quant mestier leur fuit. Et ja de novell refusent en la court nostre dit seign. de serche ou evidence encountr' le Roy ou disadvantage de luy; que pleise ordeiner per estatute, que serche & exemplification soit faitz as toutz gentz, de queconque recorde que les touche en asc' maner' auxibien de ce que chiet encountre le Roy come autres gentz. Le Roy le voet.

Right profitable also are the ancient books of the common laws yet extant, as Glanvile, Bracton, Britton, Fleta, Ingham, and Novæ Narrationes, and those also of later times, as the old Tenures, old Natura Brevium, Littleton, Doctor

To the READER.

Doctor and Student, Perkins, Fitzh. Nat. Br. and Stamford; of which the Register, Littleton, Fitzherbert, and Stamford are most necessary and of greatest authority and excellency; and yet the other also are not without their fruit. In reading of the cases in the books at large, which sometimes are obscure and misprinted, if the reader, after the diligent reading of the case, shall observe how the case is abridged in those two great abridgments of justice Fitzherbert, and Sir Robert Brooke, it will both illustrate the case and delight the reader; and yet neither that of Statham, nor that of the Book of Assises is to be rejected: and for pleading, the great Book of Entries is of singular use and utility. To the former reports you may add the exquisite and elaborate Commentaries at large of Master Plowden, a grave man, and singularly well learned, and the summary and fruitful observations of that famous and most reverend Judge and sage of the law, Sir James Dyer, Knt. late Chief Justice of the court of Common Pleas, and mine own simple labours: then have you 15 books or treatises, and as

logus inter Doctorem & Studiosum, Perkins, Fitzh. Natura Brevium, & Stamford: in quibus utcumque Registrum, Littleton, Fitzh. & Stamford, facile primas partes cum usus, tum auctoritatis & dignitatis vendicent, reliqui tamen omnes fructu suo nequaquam carent. Prolixiores vero causarum relationes quod attinet, in quibus obscuritatis aliquid, erroris item nonnihil typographi vitio occurrit, siquidem studiosus lector post accuratam majorum librorum perlectionem, magna illa duo compendia, Fitzherberti Judicis alterum, alterum Roberti Brooke militis in eadem questione consulerit, afferet profecto methodus hæc multum & lucis causæ, & lectori delectationis. Hiis accedant & Statbami atque Assisarum, ut loquimur, duo alii non contemnendi libri. Denique ad agendas causas, Intrationum ille, ut dicimus, magnus liber, usum habet atque utilitatem singularem; istis si lubet addas Magistri Plowden gravis sanè, doctique imprimis viri, enucleata prorsus et elaborata commentaria majora: compendiosas insuper atque utiles observationes illustrissimi

triffimi illius reverendiffimique judicis ac jurisperiti Jacobi Dyer militis, communis (ut loquimur) banci, sive actionum communium curiæ capitalis non ita pridem justitarii: adjicias denique & labores meos qualescunque; atque quindecim invenies sive libros sive tractatus, totidemque etiam (præter compendia) relationum justa volumina de communi nostro jure scripta; ut de statutis interim ac decretis comitialibus, quorum magni aliqui habentur libri, penitus taceam. Et quia difficile est illius artis aut scientiæ quam non profiteris, membrum aliquod verè atque limitatè tractare, quinimo impossibile ut quod non capit intellectus, lingua justè referat; caveas imprimis monco, ab annalium nostrorum ementitâ jurisprudentiâ, legumque vel ficta vel erronea relatione, quæ incauto aliàs facile imponat. Exempli gratia; referunt annales Gulielmum, quem appellant Conquestorem, vicecomitum munus in singulis provinciis decrevisse atque ordinasse, itemque & justitiæ præsides, qui paci conservandæ prospicerent & delinquentes punirent, statuisse, ubi no-

many volumes of the Reports, besides the Abridgments of the Common Laws; for I speak not of the statutes and acts of parliament, whereof there be divers great volumes. And for that it is hard for a man to report any part or branch of any art or science justly and truly, which he professeth not, and impossible to make a just and true relation of any thing that he understands not; I pray thee beware of chronicle law reported in our Annals, for that will undoubtedly lead thee to error: for example, they say that William the Conqueror decreed that there should be Sheriffs in every shire, and Justices of peace to keep the countries in quiet, and to see offenders punished; whereas the learned know that Sheriffs were great officers and ministers of justice, as now they are, long before the Conquest, and Justices of peace had not their being until almost three hundred years after, viz. in the first year of Edward the Third.

Note.

But

To the READER.

*runt docti, et fuisse olim
quales nunc sunt, vel ante
victoris illius temp' vice-
comites, primarios justitiæ
ministros; neque extitisse
etiam, nisi post trecentos
ferè exinde annos, munus
illud Justiciariorum (ut lo-
quimur) videlicet anno pri-
mo Edwardi Tertii.*

But the module of a preface will not suffer me to enter into that matter, whereat my mind began to kindle: I will only (to incite the studious reader to the diligent observation of the books, wherein be hid- den infinite treasures of knowledge) note unto thee, divers excellent things wor- thy thy observation out of the book case in 26 lib. Assis. pl. 24. for a prece- dent for thee to follow in many other cases: there it appeareth that in a writ of assise the Abbot of B. claim- ed to have conusans of pleas, and writs of assise, and other original writs out of the King's courts by prescription, time out of mind of man, in the times of Saint Edmund, and Saint Edward the Confessor, Kings of this realm before the Conquest, and shewed divers allowances thereof, and that King Hen. 1. con- firmed their usages, and that they should have conu-

Verum non me sine præfationis istæ modulus argumentum hoc ulterius prosequi, quo tamen cæ- pit mihi animus aliquan- tum incallescere: ideoque ut studiosum potius lectorem incitem ad eorum libro- rum diligentem observa- tionem, in quibus infini- ti plane scientiæ thesau- ri sunt reconditi, adnota- bo quædam e quæstione disputata libro Assisarum 26. pla. 24. digna profecto cum in se, tum præsertim operâ & attentione tuâ, utpote quæ in aliis multis causis pro exemplo tibi ad imitandum inserviant. Ibi apparet quod in re- scripto assisæ, ut loqui- mur, abbas de B. cogni- tionem atque determinatio- nem vendicavit actionum & rescriptor' tam assisæ quam originalium aliorum e curiis Regis datorum, id- que ex usu & præscriptio- ne ultra memor' hominum duæ, videlicet, a tempori- bus S. Edmundi, & S. Edw. Confessoris

*Confessoris, quorum utri-
que Reges Angliæ extite-
runt priusquam a Norman-
no duce vinceretur. Ad
hanc rem confirmandam va-
riæ præterea allatæ sunt
allocutiones; atque quod
Henricus primus eorum con-
suetudines confirmasset, &
nominatim illam de cau-
sarum ac quæstionum de-
cisionem, adeo ut neutrius
banci sive curiæ iudicibus
liceret aut interponere illic
authoritatem suam, aut jus
dicere: ex hoc rescripto
annos abhinc supra tre-
centos dato, facile liquet
quod abbates etiam supe-
riores, qui præcesserant, re-
scripta assisæ atque origi-
nalia rescripta alia e curiis
Regiis petita habuerunt:
idque ab antiquis usque
temporibus sub iisdem illis
Regibus, ultra hominûm
recordationem, ita ut ne-
mo tum extaret qui secûs
aliquandò factum sciret, si-
ve ex memoriâ & cogniti-
one propriâ, sive ex re-
scripto aut argumento quo-
cunque alio. Jam utcun-
que apud doctos constat
originalia rescripta ad vi-
cecomitem illius provinciæ
mitti ac dirigi in qua lis
orta est; tamen non abs re
erit, ad maiorem diluci-
dationem diversarum re-
rum observatione dignarum,
formulam ipsam rescripti
assisæ hoc loco apponere.*

sance of pleas, so that the
Justices of the one bench,
or the other, should not
intermeddle; out of which
record (being now above
three hundred years past)
it appeareth that the pre-
decessors of that Abbot had
time out of mind of man
in those Kings reigns,
(that is whereof no man
then knew the contrary,
either out of his own me-
mory, or by any record
or other proof,) writs of
assise, and other original
writs out of the King's
courts. Now albeit that
the learned do know that
original writs are directed
to the Sheriff of the coun-
ty where the land doth
lie, yet it is not imperti-
nent to set down the form
of the writ of assise for
the better manifestation of
divers things worthy of
observation. *Rex viceco-
miti salutem: questus est
nobis A. quod B. injuste
& sine iudicio disseisivit eum
de libero tenemento suo in
E. &c. & ideo tibi præ-
cipimus quod si prædict'
A. fecerit te securum de
clamore suo prosequendo, tunc
facias tenementum illud re-
seisiri de catallis quæ in
ipso capi fuer', & ipsum
tenementum cum catallis
esse in pace usque ad pri-
mam assisam, cum Justiciarii
nostri*

To the READER.

*noſtri in partes illas venerint, & interim fac' 12 liberos & legales homines de vicineto illo videre tene-
mentum illud, & nomina eorum imbreviar', &c.* And this form of writ appear-
eth in Bracton, lib. 4. cap. 16. and in Glanville, in his 13th book, who wrote not long after the Con-
quest: out of which I gather four things. 1. That time out of mind of man before the Conquest there had been Sheriffs; for the writ of assise, and every other original writ is directed to the Sheriff, and cannot be directed to any other, unless it be in special cases to the Coroner, who then stands in the place of the Sheriff. 2. That likewise by all that time there were trials by the oath of twelve men, for the words of the writ of assise are, *& interim fac' 12 liberos & legales homines, &c.* 3. That by like time there had been writs of assise and other original writs returnable into the King's courts, which (seeing they be, as Justice Fitzherbert saith in his preface to his book of Natura Brevium, the rules and principles of the science of the common law) do manifestly prove that the common law of England had been

Rex vicecomiti salutem: questus est nobis A. quod B. injuste & sine judicio disseisivit eum de libero ten'to suo in E. &c. Et ideo tibi præcipimus quod si prædict' A. fecerit te securum de clamore suo prosequendo, tunc facias ten'tum illud reſeiſiri de catallis quæ in ipſo capt' fuer', & ipſum ten'tum cum catallis eſſe in pace uſque ad primam aſſiſam, cum Juſticiarii noſtri in partes illas venerint, & interim fac' 12 liberos & legales homines de vicineto illo videre ten'tum illud, & nomina eorum imbreviar'. Atque hæc reſcripti formula habetur tum apud Bracton. lib. 4. c. 16. tum apud Glanvillum, lib. 13. qui a devictâ natione noſtrâ non ita multo poſt ſcripſit; hinc ergo quatuor colligo. 1. Quod nondum ſubjugatâ hac inſulâ, ultra omnem hominum memoriam vicecom' hic extiterant: quandoquidem reſcript' aſſiſæ, ut & alia ſingula reſcripta originalia vicecomiti ſoli mittuntur, nec ad alium quenquam poſſunt dirigi, niſi forte ad coronatorem, ut appellant, idque in ſpeciali aliqua cauſa, quando is etiam vicecomitis locum obtinet. 2. Quod toto illo tempore ex duodecim hominum juratorum fide definiabantur cauſæ

causæ: ita enim rescripti assisæ verba habent, Et interim fac' 12 liberos & legales homines, &c. 3. Quod per idem tempus extiterant rescripta assisæ aliaque rescripta originalia in curias regias releganda ac remittenda. Quæ sane (quandoquidem sunt ut inquit Fitzherb. in præfatione ad librum suum de Natura Brevium, juris nostri communis regulæ & principia) evincunt manifestò, & fuisse hoc antiquitus ante devictam regionem istam, ultra omnem omnium hominum recordationem, jus commune Angliæ, neque a victore Normanno alterationem aut immutationem passum esse. 4. Quod per totum illud tempus curia fuerat, quam cancellariam dicimus, utpotè ex qua sola, neque alicunde alias, petita sint originalia rescripta universa. Quin & ex libris nostris liquido constat, quod omnes fundi (quos maneria vocamus) qui erant Sancti Edwardi Confessoris, vel in hunc usque diem antiquar' possession' nomen obtinent, quodque omnes colentes & occupantes easdem Edw. Confessoris possessionibus in assis, juratis seu recognitionibus poni non debent; qua quidem immunitate ac privi-

time out of mind of man before the conquest, and was not altered or changed by the Conqueror. 4. That by all that time there had been a court of Chancery; for all originals do issue out of that court, and none other: and in our books it appeareth, that all those manors that were in the hands of Saint Edward the Confessor, are to this day called ancient demesne; and that all King Edward the Confessor's tenants in assis juratis, seu recognitionibus poni non debent; which immunity and privilege remains to the tenants of those manors, to whose hands soever the same be come to this day; and this appeareth by the Book of Domesday now remaining in the Exchequer, which was made in the reign of Saint Edward the Confessor, as it appeareth in Fitzh. Natura Brevium, fol. 16. So as without controversy the trial by juries, who ever were returned by Sheriffs, was before the Conquest. In the Book of Domesday you shall also read, that *Ecclesia Sanctæ Mariæ de Worcester habet hundred' vocat' Oswaldesthrow,*
in

Domesday Book was made in the time of William the First (called the Conqueror;) it was begun anno 1081, and not finished 'till 1086. Carte's Hist. of England, 1 vol. fol. 436.

To the READER.

in qua jacent 300 hidæ, de quibus episcopus ipsius ecclesiæ a constitutione antiquorum temporum habet omnes redditiones soccharum, & omnes consuetudines inibi pertinentes ad dominicum victum, & Regis servitium & suum: ita ut nullus vicecomes ullam ibi habere possit querelam, nec in aliquo placito, nec in aliqua qualibet causa. And it appeareth by the charter itself, that King Edward, long before the Conquest, granted to the church of Worcester the said franchises and hereditaments, whereby it is evident that then there were Sheriffs; and that the Sheriffs had then a court, and determined causes, held pleas by plaint as to this day they do, and that they were *redditiones soccharum*, which prove socage tenure, and *Regis servitium* knight's service; then called *Regis servitium*, because it was done to or for the King, and the realm: the same King granted the like charter to the monastery of St. Andrew in Ely, viz. two hundreds within the isle, and five and a half without, together with views of frank-pledge, and by express words that no Sheriff

legio gaudent omnes etiam in quorum manus ii ipsi fundi hodie deveniunt. Atque hoc apparet ex libro qui inscribitur Domesday, & in scaccario asservatur: qui sanè liber (ut refert Fitzherb. de Natura Brevium, f. 16) regnante St. Edwardo Confessore scriptus & conditus fuit. Quapropter extra controversiam planè est, morem atque consuetudinem experiundi lege per homines juratos, qui solum & semper a vicecomite citabantur, gentis hujus subjugationem præcessisse. Quin & in libro illo Domesday dicto scriptæ leges, quod ecclesia S. Mariæ de Worcester habet hundredum vocatum Oswaldeshaw, in qua jacent 300 hidæ, de quibus episcopus ipsius ecclesiæ a constitutione antiquorum temporum habet omnes redditiones soccharum, & omnes consuetudines inibi pertinentes ad dominicum victum & Regis servitium & suum: ita ut nullus vicecomes ullam ibi habere possit querelam, nec in aliquo placito nec in aliqua qualibet causa. Denique quod Edgarus Rex, diu ante devictum hanc gentem, prædictas immunitates atque possessiones ecclesiæ

sic

sive *Worcestrensi* concesserit, vel ex illa ipsa sive charta, (ut loquimur) sive donatione satis constat: ideoque & vicecomites tum fuisse, eosdemque olim velut hodie, in curia sua causas determinasse, extitisse item tunc temporis redditiones socarum, servitium socæ, hoc est aratri, servitium regis (dictum knights service) vel meridiana luce apparet clarius. Con similem prorsus donationem & monasterio sanctæ Etheldredi Elyensis concessit idem rex: videlicet duas hundred id est centurias infra insulam, & quinque ac dimidiam extra eandem, una cum cognitione franciplegiarum, ut dicimus, hoc est vadium liberorum: denique disertis verbis cavuit ne quis inibi vicecomes auctoritatem suam ullo modo interponeret; atque hæc satis profecto in re tam clara, fortassis etiam nimis multa. Si quam ergo annalium scriptoribus fidem adhibere velitis, in illis rebus detur quæ pro juris communis honore atque antiquitate tradiderunt: quale imprimis memorant de Bruto gentis hujus (ut aiunt) primo rege: quod is ubi imperium suum confir-

should intermeddle within the same; but thus much (if in a case so evident it be not too much) shall suffice. But if you will give any faith to them, let it be in those things they have published concerning the antiquity and honour of the common laws: first they say that Brutus, the first King of this land, as soon as he had settled himself in his kingdom, for the safe and peaceable government of his people, wrote a book in the Greek tongue, calling it the Laws of the Britons, and he collected the same out of the laws of the Trojans: this King, say they, died after the Creation of the World 2860 years, and before the Incarnation of Christ 1103 years, Samuel then being Judge of Israel. I will not examine these things in a *quo warranto*, the ground thereof I think was best known to the authors and writers of them; but that the laws of the ancient Britons, their contracts and other instruments, and the records and judicial proceedings of their Judges were wrote and sentenced in the Greek tongue, it is plain and evident by proofs luculent and uncontrollable: for proof whereof I shall

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be inforced only to point out the heads of some few reasons, yet so as you may prosecute the same from the fountains themselves at your good pleasure, and greāter leisure. And first take a just testimony out of the Commentaries of Julius Cæsar, (whose relations are as true, as his style and phrase is perfect.) He in his 6th book of the Wars of France saith, that in ancient time the nobility of France were all of two sorts, Druides or Equites; the one for matters of government at home, the other for martial employments abroad: to the Druides appertained the ordering as well of matters ecclesiastical, as the administration of the laws and government of the commonwealth; for so he saith, *De omnibus controversiis publicis privatisque constituunt, &c.* & si quod est admissum facinus, si cædes facta, si de hæreditate, de finibus controversia est, decernunt; premia, pœnasque constituunt. Concerning the mysteries of their religion, they neither did, nor might commit them to writing, but for the dispatching and deciding of causes, as well public as private, saith he,

masset ad tutam & tranquillam populi sui gubernationem, Græca lingua librum composuit, quem inscripsit leges Britonum, collectum e legib' Trojanorum. Atque Rex iste, inquit, mortuus est ann. ab orbe condito 2860. & ante incarnationem Christi 1103. quo tempore Israhælem Samuel judicabat. Non est instituti mei istarum rerum fidem atque auctoritatem excutere aut examinare; viderint hoc authores atque scriptores ipsi: illud tamen interea luculentis admodum & necessariis rationibus constat, solere apud veteres olim Britannos, leges, pacta, & quæcunque contractuum instrumenta alia, actiones item causarum, ac sententiarum formulas & monumenta, Græca lingua conscribi & transigi universa. Quod dam probo, cogor profecto digitum quasi ad capita & fontes rationum aliquot intendere, earumque hinc inde justam prosecutionem, siue ardenti tuo studio, siue majori forte otio relinquere. Atque primum habeas tibi e Julii Cæsaris Commentariis expressum testimonium: cujus sane auctoris non minus veræ sunt narrationes, quam est

est perfecta stylus, phrasis elegans; is lib. 6. de Bello Gallico, optimatum inquit apud Gallos duo olim genera, Druidum & Equitum: quorum illi res domi administrabant, hii negotia militaria foras procurabant: atque Druidum sane officium duplex, sacerorum procuratio, & rei-pub. ac legum administratio, ita enim diserte loquitur; de omnibus controversiis publicis privatisque constituunt, &c. Et si quod est admissam facinus, si caedes facta, si de hæreditate de finibus controversia est, decernunt, præmia, pœnasque constituunt: disciplinam religiosam aut philosophicam literis non mandant, nec fas putant; in reliquis vero rebus publicis privatisque rationibus Græcis literis utuntur inquit, ne disciplina illa efferreretur in vulgus. Jam hoc posito, quod Druides Græca lingua jus ex more dixerunt, & negotia tam publica quam privata transegerint, facile sequitur fuisse idem & in Britannia usitatum: quia omnis disciplina & tota cohors Gallicorum Druidum, Druidum Britannicorum colonia quædam fuit, vel ipso ibidem teste Cæsare, qui inquit: disci-

Græcis literis utuntur, they used to do it in the Greek tongue, to the end that their discipline might not be made common among the vulgar: now then this being granted that the Druides did customarily sentence causes, and order matters publick and private in the Greek language, it will easily follow, that the very same was likewise used here in Britain; and the consequence is evident and necessary, for that the whole society, and all the discipline of the Druides in France, was nothing else but a very colony taken out from our British Druides, as Cæsar himself in the same place affirmeth, from whence they learned and received all their discipline for managing of causes whatsoever. Disciplina Druidum (saith he) in Britannia reperta atque inde in Galliam translata: et nunc qui diligentius illam disciplinam cognoscere volunt, in Britanniam discendi caussa profisciscuntur. The very same witnesseth Pliny also, lib. 13. cap. 1. towards the end. Nay their very name and appellation may serve for a proof of the use of the Greek tongue, they being called Druides of δρῦς an oak, because, saith

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Pliny, they frequent woods where oaks are, and in all their sacrifices use the leaves of those trees. Add secondly to this, the daily commerce and traffick betwixt those Britons and French so much spoken of by Cæsar, Strabo, and Pliny: and therefore no doubt but they used one and the same form of covenanting by writing; which that it was in Greek, Strabo plainly affirmeth, *lib. 4. Geographiæ*, for that the Massilienses, a Greek colony, and, as histories report, the chiefest merchants then in the world next the Phœnicians, so spread abroad the desire of learning their language, that even vulgarly instancing therein the French nation, they did τὰ συμβόλαια Ἑλληνιστὶ γράφειν, write, saith he, their deeds and obligations in Greek; and that there passed continual traffick likewise betwixt these very Massilians and the Britons; Strabo in the same place directly affirmeth in that saith he they used to fetch tin from the British islands to Massilia, ἐκ τῶν Βρετανικῶν νήσων εἰς τὴν Μασσαλίαν κομισσέσθαι, and for this it is that Juvenal, who wrote above 1500 years past in his 15th Satire saith, *Gallia caussidi-*

plina Druidum in Britannia reperta, atque inde in Galliam translata; Et nunc qui diligentius illam disciplinam cognoscere volunt, in Britanniam discendi causa proficiscuntur. Hoc ipsum etiam testatur Plinius, lib. 12. c. 1. ad finem: quin Et nomen ipsum Druidum pro sermonis Græci usu argumento nobis esse potest; quandoquidem a Græco δρῦς appellationem Et nomen traxerint, ob hanc causam inquit Plinius quia per se roborum eligunt lucos, nec ulla sacra sine ea fronde conficiunt. Adjicias secundo loco assidua commercia Britannorum cum Gallis a Cæsare, Strabone, Plinio tantopere decantata: ergo Et iisdem paſtorum conventorumque formulis fuisse usus proculdubio est necesse, quod totum Græca lingua facilitatum esse affirmat diserte Strabo, lib. 4. Geographiæ, quia Massilienses colonia Græca (atque, ut historiæ referunt, præcipuum post Phœnices mercatores) studium discendi Græca in tantum passim excitarunt, ut solerent etiam vulgo, (de Gallis ibi loquitur) τὰ συμβόλαια Ἑλληνιστὶ γράφειν, hoc est contractuum formulas Græce

Græce scribere: quin & intercessisse item assidua commercia Massiliensibus ipsis cum Britannis, ibidem directe Strabo indicat: olim enim ait solebant Stannum ἐκ τῶν Βρεταννικῶν νήσων εἰς τὴν Μεσσηλίαν κομισσίνθαι & Britan-
 nicis insulis in Messaliam asportare: unde Juvenalis illud Sat. 15. qui mille supra & quingentos abhinc annos scripsit, respectu usus Græcæ linguæ in jurisprudentia, Gallia caussidicos docuit facunda Britannos: non quod a Gallis jurisperiti nostri eloquentiam didicerint, id quod Cæsar author certissimus negat, sed quia leges nostræ græce conscribebantur, idcirco Gallia quæ coloniam Græcam (ut ait Strabo) receperat, juris nostri professores dicitur docuisse. Porro disciplinam religiosam quæ attinet, refert idem author, lib. 4. Coluisse Britan-
 nos Cererem & Proserpinam, iisque sacra fecisse eorum plane ritu, qui in Σαμοθράκη, Samo vixerunt. Deniq; cum exercuisse Græcos hic commercia, tum non incognitam modo, sed familiarem fuisse veteribus Britannis eorum linguam probant ipsa hujus insulæ nomina. Nam Bret (un-

cos docuit facunda Britannos: Not that the Frenchmen did teach the lawyers of England to be eloquent, (which Cæsar a most certain author denieth) but that a colony of Græcians residing in France, as Strabo saith, Gallia was said to teach the professors of the laws of England, being written in the Greek tongue, eloquence. Now for matters of religion, Strabo in his 4th book observeth, that the Britains worshipped Ceres and Proserpina, and sacrificed unto them according to the Greek form of superstition as they did ἐν τῇ Σαμοθράκῃ, in Samos. Lastly, that as well the Grecians had traffick here, as that their language was not unknown to the ancient Britons, the very names given unto this our country, do declare and prove. For Bret (from whence our writers as from an old British word derive the appellation of this island and inhabitants, because the ancient Britons were wont to paint their bodies, and in Juvenal are called *piæti* Britanni, which was, saith Cæsar lib. 5. to make them seem fearful in fight to their enemies, the same word in

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that very signification is Greek, and τὸ βρέτας in Æschylus & Lycophron signifies a picture; now the other part of the word, ταυία, it is in Greek as much as land or country: I omit the name Albion, at the first Olbion, or the happy island in Greek, together with a great multitude of English words, as cyrographer prothonotary, ideote, &c. yet tasting of a Greek beginning: for that hereby as I think it is sufficiently proved that the laws of England are of much greater antiquity than they are reported to be, and than any the constitutions or laws imperial of Roman Emperors. Now therefore to return to our chronologers, they farther say, that 441 years before the incarnation of Christ, Mulumucius of some called Dunvallo M. of some Dovebant, did write two books of the laws of the Britons, the one called *Stat' Municipalia*, and the other *Leges Judiciariae*, for so the same do signify in the British tongue, wherein he wrote the same, which is as much as to say, the statute law, and the common law: and 356 years before the birth of Christ, Mercia Proba, Queen and wife of King Gwintelin,

de scriptores nostri tanquam ab antiquo verbo Britannico, regionis istius atque incolarum appellationem deducunt, eo nimirum quod soliti sint veteres olim Britanni, corpore pingere, unde picti Britanni apud Juvenalem, cujus ratio fuit inquit Cæsar lib. 5. quo fierent in prælio aspectu horribiliori) illud ipsum verbum in ipsissima eadem significatione, purum putum Græcum est; Et τὸ βρέτας apud Æschylum ac Lycophronem, picturam significat: quod ad alterum vero vocabuli illius membrum ταυία Græca vox est, idem, que plane quod apud Latinos regio sonat: mitto hic nomen alterum Albion, primo Olbion Græce beata insula, una cum Britannicorum vocabulorum ingenti quasi exercitu, quæ in hunc usque diem Græcum originem prorsus sapiunt; quando quidem vel ex hisce satis (ut opinor) liquet, antiquius multo fuisse jus nostrum quam fertur, quamque ullæ sint cujuscunque tandem Romani imperatoris leges aut constitutiones imperiales: quare ut aliquando ad chronicos nostros redeam, inquirunt porro Mulumucium ab aliis Dunvallo

*vallo M. dict', ab aliis Do-
 web' duos libros de Brito-
 num legibus annos ante
 Christum natum 441. con-
 scripsisse, alterum statuta
 municipalia dictum, leges
 judicariæ alterum, ita e-
 nim Britannice sonant ver-
 ba antiqua, idemque va-
 lent quod jus nostrum mu-
 nicipale, jusque commune.
 Porro annis ante Christum
 356. Mercia, proba regina
 & uxor regis Swinthe-
 lini, Britonum lingua de
 legibus Angliæ librum scri-
 psit, quem eundem Mar-
 chenleg. nominavit. Ad
 hæc Alfredus sive Alvre-
 dus Saxonum occidentali-
 um Rex, annos post Chri-
 stum 872. de isdem legi-
 bus Angliæ librum com-
 posuit, quem inscripsit Bre-
 viarium quoddam, quod
 composuit ex diversis le-
 gibus Trojanorum, Græ-
 corum, Britannorum, Sa-
 xonum, & Dacorum. An-
 no vero a Christi incarna-
 tione 635. Sigabert sive
 Sigesbert Orientalium An-
 glorum rex, librum scri-
 psit de legibus Angliæ,
 quem vocavit Instituta le-
 gum: Edw. rex ejus no-
 minis ante devictam hanc
 gentem tertius, ex immen-
 sa legum congerie, quas
 Britanni, Romani, Angli
 & Daci condiderunt, opti-
 ma quæque selegit, ac in*

wrote a book of the laws
 of England in the British
 tongue, calling it Mer-
 chenleg: King Alfred, or
 Alvred, King of the West
 Saxons, 872 years after
 Christ wrote a book of the
 laws of England, and
 called the same, *Brevia-
 rium quoddam, quod com-
 posuit ex diversis legibus
 Trojanorum, Græcorum,
 Britannorum, Saxonum, &
 Dacorum*: in the year af-
 ter the incarnation of
 Christ 635. Sigabert, or
 Sigesbert *Orientalium An-
 glorum rex*, wrote a book
 of the laws of England,
 calling it *Legum instituta*:
 King Edward of that name
 before the Conquest the 3.
*Ex immensa legum conge-
 rie, quas Britanni, Roma-
 ni, Angli & Daci condider-
 runt, optima quæque selegit,
 ac in unam coegit quam vo-
 cari voluit legem commun-
 em*: these and much more
 to like purpose shall you
 read in Gildas, Gervasius
 Tilburienf. Galfr. of Mon-
 mouth, Will' of Malmf-
 bury, Hovenden Matthew
 of Westminster, Polidore
 Virgil, Harding, Caxton,
 Fabian, Balæus and others.
 So as it appeareth by them
 that before the Conquest
 there were, amongst others,
 seven volumes or books
 intituled *Leges Britanno-
 rum,*

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rum, Statuta Municipalia, Leges Judiciariae, Marchenleg, Breviarium Legum, Legum Instituta, & Communis Lex. Cum insignis subætor Angliæ Rex Will^l ultiores insulæ fines suo subjugasset imperio, & rebellium mentes terribilium perdomuisset exemplis ne libera de cætero daretur erroris facultas, decrevit subiectum sibi populum juri scripto legibusque subicere: propositis igitur legibus Anglicanis secundum tripartitam eorum distinctionem, hoc est Marchenleg, Daneleg, & West-Saxonleg, quasdam, reprobavit, quasdam autem approbans transmari-
nas Newstriæ leges, quæ ad regni pacem tuendam efficacissimæ videbantur adiecit; this saith Gervasius Tilburienfis, one that wrote in the Conqueror's time, or shortly after him: whereby, if the same were admitted, it appeareth that some of the English laws be allowed, and such of his own as he added were efficacissimæ ad regni pacem tuendam, and therefore if such laws as he added of his own had continued, (as in troth they did not) they were not so shamelessly and falsely to be slan-

unam coegit, quam vocari voluit legem communem; hæc atque consimilia plura leges apud Gildam, Gervasium Tilburiensem, Galfriadum Monumathensem, Guilielmum Mamsburiensem, Hovendenum, Matthæum Westmonasteriensem, Polidorum Virgilium, Hardingum, Caxtonum, Fabianum, Balæum, atque alios: ex quibus apparet quod ante subjugatam Angliam, septem profecto sive libri sive volumina extiterunt, inscripta Leges Britonum, statuta Municipalia, leges Judiciariae, Marchenleg, Breviarium legum, legum Instituta, & communis lex. Cum insignis subætor Angliæ Rex Willielmus ultiores insulæ fines suo subjugasset imperio & rebellium mentes terribilium perdomuisset exemplis, ne libera de cætero daretur erroris facultas, decrevit subiectum sibi populum juri scripto legibusque subicere, propositis igitur legibus Anglicanis secundum tripartitam eorum distinctionem, hoc est Marchenleg, Daneleg, & West-saxonleg, quasdam reprobavit, quasdam autem approbans transmari-
nas Newstriæ leges, quæ ad regni pacem tuendam effica-

*efficacissime videbantur ad-
jecit; hæc habet Gerva-
sius Tilburiensis, qui aut
victoris ipsius temporibus,
aut non ita multo post
scripsit: ex quo constat
(siquidem fidei quid hic
author habeat) & appro-
basse illum leges Angliæ
nonnullas, & fuisse illas
quas de suo addidit ad reg-
ni pacem tuendam effica-
cissimas; ideoque si per-
stitissent, etiam atque per-
mansissent leges illæ ad-
jectitiæ (id quod neuti-
quam videmus factum)
at contumelia illa tamen
tam impudenti, tamque
adeo falsa nequaquam dig-
næ fuissent, qua eas non-
nulli maliciose, ne dicam
an ignoranter magis affe-
cerunt. De quibus illud
tantum dico;*

*Authæc in nostros fabrica-
ta est machina muros;
Aut aliquis latet error,
equo ne credite Teucris.*

*Interea tamen ut habeas
lector in quo acquiescas,
audi quid Joh. Fortescue
miles, capitalis Angliæ
justiciarius, singulari cum
doctrina tum auctoritate
vir de hac ipsa re scripse-
rit. Is libro primo c. 17.
de legibus Angliæ agens;
quæ si optimæ inquit non
extitissent, aliqui regum*

*dered, as some maliciously
and ignorantly have done;
of whom I only say,*

*Aut hæc in nostros fabricata
est machina muros;
Aut aliquis latet error, equo
ne credite Teucris.*

for thy satisfaction herein,
hear what Sir Jo. Fortes-
cue, Kt. Chief Justice of
England, a man of excel-
lent learning and authori-
ty, wrote of this matter,
lib. 1. cap. 17. speaking of
the laws of England;
quæ si optimæ non exti-
tissent, aliqui regum illo-
rum justitia, ratione, seu
affectione concitati eas mu-
tassent, aut omnino dele-
vissent, & maxime Ro-
mani qui legibus suis quasi
totum orbis reliquum ju-
dicabant. After the Con-
quest King Henry the
first, the Conqueror's son,
surnamed Beauclarke, a
man excellently learned,
because he abolished such
customs of Normandy as
his father added to our
common laws, is said to
have restored the antient
laws of England: King
Henry the second wrote
a book of the common
laws and statutes of Eng-
land, divided into two
tomes, and according to the
same division, intituled the
one *pro republica leges,*
and

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* See the Laws
of H. 2. in
Wilkins's
Saxon Laws,
P. 318 to 338.

and the other *Statuta Regalia*, whereof not any fragment doth now remain *. And yet by the way, I could but smile when I read in some of them, that when Cardinal Woolsey at the last perceived untrue surmises, and feigned complaints for the most part of such poor people as laded him with petitions, he then waxed weary of hearing their causes, and ordained by the King's Commission divers under-courts to hear complaints by bill of poor people; the one was kept in the Whitehall, the other before the King's Almoner Dr. Stokesley, a man that had more learning than discretion to be a Judge; the third was kept in the Lord Treasurer's Chamber, beside the Star-Chamber, and the fourth at the Rolls at the afternoon: these courts were greatly haunted for a time, but at the last the people perceived that much delay was used in these courts, and few matters ended, and when they were ended, they bound no man by the law, then every man was weary of them, and resorted to the common law; but *trahent fabrilis fabri*; and yet it were to be wished that they had kept themselves within their

illorum justitia, ratione, vel affectione concitati eas mutassent, aut omnino delevisent, & maxime Romani qui legibus suis quasi totum orbis reliquum judicabant. Post subactionem nostram Henricus ejus nominis primus, victoris filius cognomento Beuclerke, præstanti vir doctrina, ob id antiquas leges Angliæ restituisse dicitur, quod consuetudines Normannicas a patre ipsius superinductas penitus abolerit: Henricus vero secundus Librum etiam de legibus & statutis Angliæ composuit, quem in duos tomos sectum, alterum pro Republica leges, alterum statuta regalia, secundum divisionem illam inscripsit, quorum ne fragmentum extat hodie reliquum. (2.) Nequeo tamen obiter abstinere risu interea, cum apud Annalium hosce scriptores quosdam lego, quod ubi Cardinalis Woolseyus persensisset in supplicationibus vulgi, quibus indies onerabatur, aut suspiciones falsas, aut fictas queremonias ut plurimum contineri, labore illo audiendi causas defatigatus, ex concessione & edicto Regis, minores aliquot curias substituit, quæ audiendis populi querelis per li-

libellos supplices inservirent, harum unam constituit in ædibus dictis Whitehall, alteram coram eleemosynario regio doctore Stockesley, viro utcunque docto, certe ad officium & munus Judicis minus apto & discreto: tertiam in cubiculo mag' Angliæ thesaurarii juxta cameram stellatam: et quartam apud rotulorum custodem post meridiem; atque ad has quidem curias frequens populus aliquandiu confluit, verum earum tædio demum victi, ubi causas plurimas de die in diem vidissent dilatas, paucas vero compositas, neque quenquam denique teneri lege latæ illic sententiæ utcunque stare, ad jus commune omnes inde convolarunt: sed tractent fabrilis fabri. Et optandum sane esset ut intra metas suas se continuissent, quando eorum forte aliqui apud viros prudentes illorum tandem reportarunt præmium, quibus ne tum quidem creditur, etiam cum verum dicunt. Doctis vero & prudentibus historiographis consilium illud do, ne immisceant sese temerè alienis studiis, neve in mysteria cujuscunque tandem artis aut scientiæ, imprimis vero legum hujus regni

proper element, for per-
adventure with wise men,
some of them have reaped
the reward of those that
are not believed, when
they say the truth. To the
grave and learned writers
of histories, my advice is,
that they meddle not with
any point or secret of any
art or science, especially
with the laws of this
realm, before they confer
with some learned in that
profession.

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And where it is reported, that it was not lawful for any common person to use any seal to any deed, charter, or other instrument in the reign of Hen. 2. nor long after, and therefore Richard Lacy Chief Justice of England, in the reign of Hen. 2. is said to have reprehended a common person, for that he used a patent seal, when as that pertained, as he said, to the King and Nobility only; against which, Ingulphus Abbot of Croyland, who is said to have come in with the Conqueror saith, *ante Normannorum ingressum cirographa firma erant cum crucibus aureis, aliisque signaculis, sed Normannos cum cerea impressione uniuscujusque speciale sigillum sub intitulatione trium vel quatuor testium conficere cirographa instituire*, by which it appeareth, that in the Conqueror's time, every man might seal with a private seal: but letting these pass, and to believe neither till both of them be agreed, in troth it was ever unlawful for a gentleman to

non consulto prius docto aliquo ejus professore, irruant aut invadant.

Atque quod fertur non licuisse publicitus, regnante Henrico secundo & multo post, in pactis, donationibus aliisque instrumentis plebeio homini sigillo privato uti (quo nomine Richard Lacy capitalis totius Angliæ justitiarius temporibus Henrici secundi hominem plebeium reprehenderit, qd' sigillo patenti ut loquuntur usus sit, id quod regis tantum ac procerum fuisse dicitur:) contrarium plane habet Ingulphus Abbas de Croyland, qui cum gentis hujus victore una huc devenit, " atque quod ante Nor-
" mannorum ingres. ciro-
" grapha firma erant cum
" crucibus aureis aliis
" signaculis, sed Norman'
" cum cerea impressione
" uniuscujusque speciale
" sigillum, sub intitula-
" tione trium vel quatuor
" testium conficere ciro-
" grapha instituire: unde
" constat cuivis e plebe
" licuisse temporibus illi-
" us victoris privato si-
" gillo suo cirographum
" signare." Verum ut rem
hanc aliquando missam facia-
mus, atq; neutri parti tantif-
per credamus, dum inter sese
mutuo convenerint, illud
pro-

profecto certum est, nunquam licuisse sive homini generoso alterius insignia aut sigillum usurpare, sive cuicunque alii cujusvis signaculum affingere aut imitari; alias vero semper cuiusvis subdito licuit, sigillum suum cuicunque tandem instrumento apponere; atque hoc infinitis prope constat exemplis; ego tamen unico instar omnium contentus ero, quod a Magistro Josepho Hollandio Interioris Templi socio accepi, antiquario sane perito & bonarum literarum amantissimo; datum vero fuit an. 33 H. 2. & vel in hunc usque diem vetera duo pulcherrima sigilla gestat, alterum Gaulteri de Fridastorpe, alterum Helie ipsius filii: et quia multa notatu digna continet, opere pretium putavi in lectoris gratiam, de verbo ad verbum huc transferre. Hæc est concordia facta in comitatu Ebor' die Lunæ proxime post festum Sancti Hilarii anno regni Regis Henrici secundi 33, inter Walterum de Fridastorpe & Heliam filium ejus, & inter Johannem de Beverlaco, scilicet, de una carucata terræ in Fridastorpe, quam præd' Joh. clamavit versus eos in eod' com' sicut jus & hæreditagium suum, per breve Dom'

usurp the arms or seals of another; and to forge or counterfeit the seal of any other was unlawful for any: but otherwise it was never unlawful for any subject to put his own seal to any instrument, as may appear by infinite precedents, amongst which for an instance, I thought good here to remember one for all, which Master Joseph Holland of the Inner Temple, a good antiquary, and a lover of learning delivered unto me, and beareth date anno 33 H. 2. and is sealed at this present with 2 fair ancient seals, viz. of Walter of Fridastorpe, and Helias his son, and for that it containeth divers matters worthy observation; I thought good to exemplify it to the reader de verbo in verbum. Hæc est concordia facta in comitatu Eborum die Lunæ proxime post festum Sancti Hilarii anno Regni Regis Henrici secundi 33, inter Walterum de Fridastorpe & Heliam filium ejus, & inter Johan. de Beverlaco, scil. de una carucata terræ in Fridastorpe, quam præd' Joh. clamavit versus eos in eodem comitatu sicut jus & hæreditagium suum per breve Dom' Reg' scil. quod præd' Walt.
 &

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Et Helias filius ejus dederunt, Et reddiderunt præd' Johanni pro clameo Et recto suo quod in ipsa terra habuit, unam dimid' carucatam terræ in eadem villa, Et unum toftum, scil' illam dimid' carucatam terræ quæ jacet inter terram Galfrid' Wanlin Et inter præd' carucatam terræ quam clamavit, Et illud toftum qd' jacet inter terram Adæ filiæ Norman' de Sezevall' Et terram Hen' filii Thom' plenarie cum omnibus pertinentiis suis infra villam Et extra sine ullo retenemento; hanc vero dimid' carucatam terræ Et toftum plenarie cum omnibus pertinentiis suis tenebit præd' Joh' Et hæred' sui de præd' Helia Et hæredib' suis, Reddendo inde annuatim præd' Helia Et hæredib' suis 12 d. ad termin' Pentecost, pro omnibus servitiis quæ ad terram illam pertinent: et præd' Walterus Et Helias Et hæred' sui warrantizabunt præd' Joh' Et hæredibus suis præfat' dimid' carucat. terræ Et toftum, cum omnib' pertinen' contra omnes homines: hanc vero concordiam ex utraque parte affidaverunt firmiter Et sine dolo tenend', sicut præsens Cirographum testatur, Et sæpe dictus Walterus atturnavit prædict'

Reg' scil' qd' præd' Walt' & Helias filius ejus dederunt, & reddiderunt præd' Jo' pro clameo & recto suo quod in ipsa terra habuit, unam dimid' carucat' terræ in eadem villa, & unum toftum, scil' illam dimid' carucatam terræ quæ jacet int' terr' Galfrid' Wanlin & int' præd' carucatam terræ quam clamavit, & illud toft' qd' jacet inter terr' Adæ filiæ Norm' de Sezevall' & terram Henr' filii Thom' plenarie cum omnibus pertin' suis infra villa' & extra sine ullo retenemento; hanc vero dimid' carucatam terr' & toft' plenarie cum omnib' pertinen' suis tenebit præd' Joh' & hæred' sui de præd' Helia & hæred' suis, Reddendo inde annuatim præd' Helia & hæredib' suis 12 d. ad termin' Pentecost', pro omnib' servitiis quæ ad terram illam pertinent: et præd' Walterus & Helias & hæred' sui warrantizabunt præd' Joh' & hæred' suis præfat' dimid' carucatam terræ & toft', cum omnib' pertinen' contra omnes homines: hanc vero concordiam ex utraque parte affidaverunt firmiter & sine dolo tenend', sicut præsens Cirographum testatur; & sæpe dictus Walterus atturnavit præd' Johan' in eodem com' ad faciend' præd' Helia filio suo, & hæred' suis; hiis testibus Remigio Dapi-

Dapifero, Ranulp' de Glan-
vill' tunc Vicec' Ebor', Ra-
nulp' filio Walteri, Roger de
Badnut, Warino de Rolles-
by, Alano de Sinderby, Ra-
dulp' filio Radul. Will' de
Aton', Nich' de Warham,
Rob' de Mara, Alano filio
Heliae, Roberto de Melfa,
Thom' filio Jodlani, Wal-
ram' filio Will' Walter' de
Bomadnum, Alano Male-
banke, Adamo de Kellum,
Robert' de Malteby, Gil-
bert' de Torini, Will'mo
Agullum, Gilbert' filio Ric'
Will'mo de Backestorpe,
Helia Latimer; "quo qui-
"dem rescripto sive brevi
"rex domino mandavit,
"quod sine dilatione ple-
"num rectum teneat Joh'
"de Beverlaco de una ca-
"rucata terræ cum perti-
"nen' in Fridastorp quam
"clamavit, & quam Wal'
"de Fridastorp, & Helias
"filius ejus ei deforc' &
"nisi fecerit Vicecomes
"Ebor' faciat, ne amplius
"inde clamorem audiamus
"pro defectu recti." *Ad ple-
norem vero hujus rei intel-
ligentiam, tenendum im-
primis quod Joh' de Be-
verlaco rescript' seu breve
addux' pro jure suo recupe-
rando contra Walterum de
Fridastorpe & Heliam fili-
um ejus, idque de una caru-
cata terræ in Fridastorpe,
quod quidem breve Domi-*

*Johan' in eodem comitatu
ad faciendum præd' servi-
tium præd' Heliae filio suo,
& hæredibus suis; hiis tes-
tibus Remigio Dapifero,
Ranulpho de Glanvil' tunc
Vicecomite Eborum, Ra-
nulp' filio Walteri, Ro-
gero de Badnut, Warino
de Rollesby, Alano de
Sinderby, Radulpho filio
Radul' Will' de Aton',
Nich' de Warham, Robert'
de Mara, Alano filio He-
liae, Roberto de Melfa,
Thom' filio Jodlani, Wal-
ram filio Will' Waltero de
Bomadnum, Alano Male-
banke, Adamo de Killum,
Roberto de Malteby, Gil-
berto de Torini, Will' A-
gullum, Gilberto filio Ri-
chardi, Will'mo de Backe-
storpe, Helia Latimer; by
which writ the King com-
manded the Lord, quod
sine dilatione plenum rec-
tum teneat Johan' de Be-
verlaco de uno carucata
terræ cum pertinentiis in
Fridastorpe quam clamat,
& quam Walterus de Fri-
dastorpe, & Helias filius
ejus ei deforc' & nisi fe-
cerit Vicecomes Eborum
faciat, ne amplius inde
clamorem audiamus pro de-
fectu recti. For thy better
understanding, hereby it
appeareth that J. de Be-
verlaco brought a writ of
right against Walter of Fri-*

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Fridastorpe, and Helias his son, of one plough-land in Fridastorpe, directed to the lord of the manor of whom the said plough-land was holden, which writ was after by a precept made by the Sheriff called a *Tolt*, (because it doth *tollere loquelam* from the Court Baron to the County Court) removed into the County Court, where before Ranulph de Glanvilla then Sheriff of York, this concord was by consent of parties made in the County Court, by force of the commission given to the Sheriff in default of the lord, by the said writ, (*viz.*) that the Sheriff in this County Court should see that the demandant should without delay have his full right in the said plough-land, upon which writ so brought in that court this concord was made, and not only entered into the rolls of the County Court, but by way of instrument indented, mutually sealed by either party; so as by this concord the perclose of the writ, *ne amplius inde clamorem audiamus pro defectu recti* was satisfied, and to the end that this concord might be the more firmly kept, each party bound himself to the other by an affidavit:

no illius fundi missum fuit, a quo carucata illa terræ tenebatur: inde vero hoc ipsum breve ad Committatus curiam vi præcepti per Vicecomitem facti (quod ideo apud nos vocatur a *Tolt* quia tollit atq; eximit causam e curia Baronis ad illam comitatus) removebatur, ubi coram Ranulpho de Glanvilla Ebor' tunc tempor' Vicecomite mutuo partim consensu facta est in curia comitatus concordia hæc, idque vi præcepti per breve illud vicecomiti dat', ut si Dom' ipse officio in hanc parte deesset, tum curaret vicecomes in Comitatus curia ut plenum jus suum in carucata illa terræ actor possit recuperare. Rescripti igitur, seu brevis illius virtute, facta est illa Curia concordia hæc, & relata ac inscripta non solum in rotulis curiæ Comitatus, sed in instrumento etiam qd' Indenturam vocant, utrinq; ex utraq; parte mutuo consignato; atque sic adimpletum fuit rescripti illius *ne amplius clamorem audiamus pro defectu recti*. Deniq; quo firmior staret atq; inviolabilior hæc concordia, utraque pars se alteri per breve illud devinxit, quod fortassis hinc inde dictum est affidavit:

affidavit: quod sanè ex antiquo hoc & docto instrumento necessariò colligitur; nam per literas Dom' Reg' intelligitur rescript' seu breve de re sua recuperanda in hiis verbis clamavit, &c. jus suum, verum infrà disertè ubi dicitur pro clameo & recto suo; ad hæc constat quod concordia hæc facta fuit in comit' Ebor', & clamavit versus eos in eod' comitatu, &c. per breve Domini Reg', hocque totum factum fuit coram Ranulpho de Glanvilla tunc vicecomite: jam vero doctos quosq' non latet, quod breve de jure suo recuperando in curiam comitatus mitti ac dirigi non potest, verum eo per præcept', vocatum Tolt, debet necessariò removeri: illud bone lector audacter tibi aüssim affirmare quod concordiam banc adeo præstantem, adeo scriptam benè, nullus sive abbas, sive monachus, sive clericus alius, qui annales nostros aut earum fortè partem aliquam conscripsit, intelligere potuisset. Verum redeamus aliquando ad antiquor' tempor' graves sane & doctos legum scriptores, qui defecerunt (ut conjicio) ad finem regni Hen' septimi, inter quor' relationes ac

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All this is necessarily collected out of this ancient and learned instrument; for *per breve Domini Regis* is intended a writ of right by these words *clamavit, &c. jus suum*; and afterwards expressly, when it is said *pro clameo & recto suo*: also it appeareth that this concord was made in *comit' Eborum*, and *clamavit versus eos in eodem, comit'*, &c. *per breve Domini Regis*, and all this was done *coram Ranulpho de Glanvilla tunc vicecom'*: and the learned do know that a writ of right cannot be returnable in the county court, but must of necessity be removed thither by *Tolt*. Good reader I dare confidently affirm unto thee, that never any abbot, monk, or churchman, that wrote any of our annals, could have understood this excellent and well indicted concord. But to return again to these grave and learned reporters of the laws in former times, who (as I take it) about the end * of the reign of K. H. 7. ceased, between which and the cases reported in the reign of Hen. 8. you may observe no small difference: so as about the end of the reign of Hen. 7. it was

c

thought

* Rather the beginning; the policy of the reign being, to leave as few memorials of it to posterity as possible.

To the READER.

thought by the sages of the law, that at that time the reports of the law were sufficient; wherefore it may seem both unnecessary and unprofitable to have any more reports of the law: but the same causes that moved the former, do require also to have some more added unto them for two special ends and purposes. First to explain and expound those statutes and acts of parliament which either have been enacted since those reports, or were not (no occasion falling out) in any former reports expounded at all.

2. To reconcile the doubts in former reports, rising either upon diversity of opinions or questions moved and left undecided, for that it cannot be, but in so many books written in so many several ages, there must be (as the like in all sciences and arts both divine and human it falleth out) some diversity of opinions and many doubts left unresolved: for which only purposes I have published the for-

scripta, atque eorum quæ temporibus Hen. 8. subsecuti sunt, quantum intersit facile potes observare; unde fuit quod circa finem Hen. 7. consultissimis jurisperitis persuasum erat, librorum tum atque relationum juris abunde satis extitisse: quid ergo an supervacaneum prorsus & inutile putabimus plura etiam illis adjicere? Certè quæ res duæ imprimis superiores illas relationes & libros causabant & procurabant, illæ ambæ plures etiam hodie requirunt flagitantque. Primò ad ea statuta atque decreta comitialia explicanda atque exponenda quæ inde a scriptis illis in hunc diem aut sancita fuerunt, aut (nulla interveniente occasione) non exposita.

2. *Ad consilianda quædam dubia in iisdem libris orta vel ex opinionum varietate, vel ex motis quidem nec solutis postea questionibus: fieri enim non potest quin in tot libris, tamque adeo diversis sæculis scriptis (id quod in aliis scientiis & artibus universis tam divinæ quam humanis usu venit) opinionum varietas aliqua contingat, dubiisque plurimis non satisfiat. Quare*
ob

ob has causas elucubrationum mearum partes priores duas, bancquæ postremò ultimam in lucem edidi, quæ legum studiosos (id quod speroque ac cupio) ad illorum veterum præstantissimorum utilissimorumque librorum frequentem magis ac diligentem revolutionem excitare & movere possint. Atque sanè relationes istæ meæ (siquidem meas dicere liceat quæ aliorum sunt conscriptæ sententiæ) commentariorum naturam sortiuntur, & faciunt vel ad sæliciores apprehensionem genuinæ ac veræ interpretationis quorundam generalium statutorum, quæ licet universum hoc regnum respiciunt, tamen quoad præcipuas quasdam partes, nunquam prius fuerunt exposita aut explicata; vel ad saniores intellectum germani sensus, ac rationis judiciorum atque sententiarum antebac relatarum; vel denique ad dubiarum quæstionum (quales multæ in illis non solutæ adhuc reperiuntur) plenam certamque determinationem. Hinc ergo prioribus duobus libris ad explicandum & exponendum statutum illud in 23 Hen. 8. c. 10. actam dedi Porteri causam: pro tam

mer two, and this last part of my Reports, which I trust will be a mean (for so I intended them) to cause the studious to peruse and peruse again with greater diligence, those former excellent and most fruitful reports: and in troth these of mine (if I may so call them, being the judgments of others) are but in nature of commentaries, either for the better apprehending of the true construction of certain general acts of parliament concerning the whole realm, in certain principal points never expounded before; or for the better understanding of the true sense and reason of the judgments and resolutions formerly reported; or for resolution of such doubts as therein remain undecided: for which purposes, in my former Reports I have reported and published for the explanation and exposition of the statute of 23 H. 8. c. 10. Porter's case: of the broad spreading stat. of 27 H. 8. c. 10. of uses, the cases of Chudleigh, Corbet, Shelfley, Albany, and the Lord Cromwel's case: of the statute of 34 H. 8. cap. 20. of Recoveries, Wiseman's case; of the statute of 13 Eliz, cap. 7. of Bankrupts,

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the case of Bankrupts ; of the statute of 34 H. 8. cap. 21. of Confirmation of Letters Patent, Doddington's case ; of the statute of 31 H. 8. of Dissolution of Monasteries, and of the statute of 1 Ed. 6. of Chuntries, the Archbishop of Canterbury's case ; and of one branch of the great and general statutes of 32 and 34 H. 8. of Wills, Bingham's case : I have reported the Lord Buckhurst's case, for the true understanding and expounding of the ancient and former book cases concerning charters and evidences, and to that end the residue of the cases of those two former parts are published. And seeing the end of these laws is to have justice duly administred, and that justice distributed is, *jus suum cuique tribuere*, to give to every one his own : let all the professors of the law give to these books that justice which these books have in them, that is, to give to every book and case, his own true understanding : and not by wresting or racking, or inference of wit to draw them (no not for approving a truth) from their proper and natural sense ; for that were a point of great injustice. For truth and falsehood are so opposite, as

latè patenti statuto illo in 27 H. 8. de usibus retuli causas hasce Ckudl:igh, Corbet, Shelley, Albany: illam item Domini Cromwell, de statuto 34 Hen. 8. c. de recuperationibus: Causam Wisemanni, de statuto in 13 Eliz. c. 7. de obstructis ære alieno qui fidem ac tesseram ruperunt, eorem item causam in particulari, ex statuto in 34 Hen. 8. c. 21. De confirmatione literarum patentium causam Dodingtoni, ex statuto 31 Hen. 8. de dissolutione monasteriorum: item in 1 Eliz. de canteriis (ut loquimur) causam Episcopi Cantuariensis, præterea membrum unum magnorum illorum ad generalium statutorum in 32 & 34 H. 8. de testamentis, causam Binghami: retuli etiam causam Domini de Buckhurst, pro vero intellectu chartarum & antiquarum relationum de concessionibus seu chartis & evidentiis ut loquimur, atque huc ferè spectant reliquæ causæ duobus illis superioribus libris a me editæ. Cum igitur eo tendant leges istæ ut justitia administretur, sitque hoc justitiæ distributiæ suum cuique tribuere, illud demum tribuant jurisperiti omnes libris

libris hisce, quod ipsis hii libri dederunt prius, hoc est singulis tam libris quam causis proprium suum ac genuinum intellectum, neque a germano suo sensu, vel ad veritatem aliquam confirmandum argutis illationibus inflectendo, extendendo, depravando torqueant, quod esset summæ prorsus injustitiæ.

Jam ex omnibus hisce libris ac relationibus juris communis illud observavi, quod utcumque aliquando ex statutis comitalibus, quandoque etiam ex acumine atque inventione humana quædam juris hujus partes sive immutatae fuerint, sive a cursu suo inversæ atque distrahæ, tamen de cursu ac revolutione temporis idem semper jus, tanquam tutissimum fidelissimumque Reipub. firmamentum ac præsidium, magno sanè applausu ad incommoda multa devitanda obtinuit & restitutum fuit. Exempli causa dictavit communis juris prudentia ut hæreditatium jus omne per feudum simplex (ut loquimur) transiret, adeò ut tuto possent inter se homines alienare, allocare, & contrahere; verum statutum Westmon. 2. cap. 1. aliud tulit jus limitatum,

truth itself ought not to be proved by any gloss or application, that the true sense will not bear.

Out of all these books and reports of the common law, I have observed, that albeit some time by acts of parliament, and some time by invention and wit of man, some points of the ancient common law have been altered or diverted from his due course, yet in revolution of time, the same (as a most skilful and faithful supporter of the commonwealth) have been with great applause, for avoiding of many inconveniencies, restored again: as for example, the wisdom of the common law was, that all estates Co. Lit. 282 of inheritance should be fee-simple, so as one man might safely alien, demise, and contract to and with another: but the statute of 6 Co. 40. Præf. Westm. 2. cap. 1. created 1. 4. & 1. 9. an estate tail, and made a perpetuity by act of parliament, restraining tenant in tail from aliening or demising but only for the life

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of tenant in tail, which in process of time brought in such troubles and inconveniences, that after two hundred years, necessity found out a way by law for a tenant in tail to alien. Also by the ancient common laws, freeholds should not pass from one to another but by matter of record, or solemn livery of seisin; but against this were uses invented, and grew common and almost universal through the realm, in destruction of the ancient common law in that point: but in time the manifold inconveniences hereof being by experience found, the statute of 27 Hen. 8. c. 10. was made for restoring of the ancient common law again, as it expressly appeareth by the preamble of that statute; and hereof an infinite more of examples might be added, but hereof this shall suffice: and thus much of the books and treatises, and of the reporters and reports of the laws of England.

illud quæquæ incisum quod nostri vocant an estate-tail, & decreto comitorum perpetuitatem quandam statuit, quæ tenentem in tail ut loquuntur, hoc est illiusmodi possessiones incolentem & occupantem restringeret, quo minus alienare quid aut allocare possit, nisi tantum pro tenentis ipsius vita naturali: quod quidem statutum tantas turbas totquæ incommoda de cursu temporis invexit, ut post 200 tandem annos, necessitas ipsa rationem ac viam per legem inire atque excogitare docuerit, quâ liceret possessiones sic tenenti abalienare; cavit præterea jus commune, ne tenementa libera ut dicimus de manu in manum irent, nisi vel transactionis illius extaret scripto monumentum, vel solenni more possessio atque jus in re traderetur: contra hoc adinventi sunt usus, ut appellant, qui in tantum creverunt ut obtinerent etiam ad antiqui juris in illa parte destructionem, non solum vulgo sed ferè per totum hoc regnum universum: verum aliquando ubi experientia docuisset quam multifaria hinc incommoda pullularent: latum est statutum illud

*illud in 27 H. 8. cap. 10. de
revocando atque restituendo
antiquo jure communi, ut
ex ill' proæmio disertè patet,
infinita plane sunt in hoc
genere exempla, verum no-
bis hæc sufficient: atque de
libris & tractatibus, de-
que relationibus ac scripto-
ribus legum Angliæ hæc
hætenus.*

*Sequitur nunc de gradi-
bus qui illarum legum stu-
diosi sunt proprii; sicut
enim in utraque academia
Cantabrigiensi atque Oxo-
niensi varii gradus sunt,
quales Sophistæ generales,
Baccalaurei, Artiûm Ma-
gistri, Doctores, ex quibus
viri ad eminentia loca &
sedem judicii in ecclesia
curiisque ecclesiasticis apri
eliguntur: ita sunt & in
jurisprudencia nostra pri-
mo quos vocamus Moote-
men inceptor, qui question'
a lectoribus propositas in
ædibus cancell', tam in ter-
minis quam magnis vaca-
tionibus arguunt & dispu-
tant: ex hiis post studi-
um octo annorum aut cir-
citer, eliguntur juricons-
ulti, nobis Utterbarristers
dicti; ex quibus constitu-
untur lectores in hospitiiis
cancellariæ, qui post ex-
pletos duodecim ad minim'
annos, a suscepto illo
gradu in senatorum sive
patrum ac seniorum clas-
sicorum numerum quos*

Now for the degrees of
the law, as there be in the
universities of Cambridge
and Oxford divers degrees,
as general Sophisters, Ba-
chelors, Masters, Doctors,
of whom be chosen men for
eminent and judicial places,
both in the church and ec-
clesiastical Courts; so in the
profession of the law, there
are Mootemen (which are Mootmen,
those that argue readers
cases in houses of Chan-
cery, both in terms and
grand vacations.) Of Moote-
men, after eight years study
or thereabouts, are chosen
Utterbarristers; of these are Utterbarrif-
ters.
chosen readers in inns of
Chancery: Of Utterbarri-
sters, after they have been of
that degree twelve years at
least, are chosen Benchers, or Benchers.
Ancients; of which one, that
is of the puisne sort, reads
yearly in summer vacation,
and is called a single Rea- Readers.
der; and one of the Ancients
that had formerly read,
reads in Lent vacat. and is
called

To the READER.

Readers.

Attorney Gen.
&c.

Serjeants.
See the Preface
to 10 Co.

King's Serj.

Judges.

Inns of Chan-
cery.

called a Double Reader, and commonly it is between his first and second reading, about nine or ten years. And out of these the King makes choice of his Attorney, and Solicitor General, his Attorney of the Court of Wards and Liveries, and Attorney of the Duchy: and of these Readers, are Serjeants elected by the King, and are, by the King's writ, called *ad statum & gradum servientis ad legem*; and out of these the King electeth one, two, or three as please him, to be his Serjeants, which are called the King's Serjeants: of Serjeants are by the King also constituted the honourable and reverend Judges, and sages of the law. For the young student, which most commonly cometh from one of the universities, for his entrance or beginning were first instituted, and erected eight Houses of Chancery, to learn there the elements of the law, that is to say, Clifford's inn, Lyon's-inn, Clement's-inn, Barnard's-inn, Staple's-inn, Furnival's-inn, Thavie's-inn, and New-inn; and each of these houses consist of forty or thereabouts: for the Readers, Utterbarriers, Mootemen, and inferior Students, are 4 famous

Benchers *dicimus co-optantur; ex hac classe singulis annis novissimus quisque recentissimusque in astitiva vacatione praelegit, dictus lector primo; in quadragesimali autem vacatione senior alius, qui lector secundo nominatur: inter primam vero atque secundam cujusque praelectionem intercedunt ferè anni novem aut decem; atque ex hiis quidem elegit Rex procuratorem suum & solicitatorem (ut loquimur) generalem Attornatum in curia pupillorum & liberationum, & in curia ducatús: insuper ex hiis per breve Regis vocantur alii ad statum & gradum servientium ad legem, inter quos Rex qui ipsi sibi inservient duos aut tres pro arbitrio elegit: denique ex hiis, honoratos ac reverendos Judices atque presides juris Rex constituit. Tyrones quod attinet qui huc fere ab academiis accedunt, habent illi in quibus rudimenta atque elementa juris perdiscant aedes cancellariae octo, vocata Clifford's-inn, Lyon's-inn, Clement's-inn, Bernard's-inn, Staple-inn, Furnival's-inn, Thavie's-inn, New-inn; harum singulae quadraginta plus minus legum studiosos continent*

ment. Proprie lectoribus vero & jurisconsultis, atque inceptoribus aliisque inferioris ordinis studiosis extant amplissima quatuor illustrissimaque collegia, vocata Inns of Court, quæ sunt Templum Interius, ad quod pertinent priores tres cancellariæ ædes; Hospitium Graii, cui subsunt duæ proxima sequentes; Hospitium Lincolnienſe, cui duæ aliæ; denique Templum Medium, cui ædes postremæ inserviunt. Constant autem singula hæc collegia lectoribus supra viginti, Jurisconsultis plusquam 60, Tyronibus circiter 160, aut 180, qui omnes inibi tempus suum in jurisprudentiæ studio aliisque exercitiis dignis laude, & hominibus liberis ac generosis impendunt. Judices & servientes ad legem quod attinet, qui fere numerum vicenum expleant aut excedunt, in ædes duas quæ dicuntur Hospitia, servientiū ad legem, suntque majoris eminentiæ & dignitatis, equaliter distribuuntur: atque universa hæc Hospitia, ut neque inter se longe sunt distita, ita conjunctim omnia consciunt sanè præ omnibus in toto terrarum orbe cujuscunque scientiæ huma-

and renowned Colleges, or Inns of Court. Houses of Court, called The Inner Temple, to which the first three Houses of Chanc. appertain; Gray's-Inn, to which the next two belong; Lincoln's - Inn, which enjoyeth the last two but one; and the Middle Temple, which hath only the last: each of the Houses of Court consists of Readers* Or Benches. above twenty; of Utterbar-risters above thrice so many; of young Gentlemen about the number of eight or nine score, who there spend their time in study of law, and in commendable exercises fit for gentlemen: the Judges of the law and Serjeants being commonly above the number of 20, are equally distinguished into two higher and more eminent Houses, called Serjeant's Inn: all these are Serjeant's Inn. not far distant from one another, and all together do make the most famous university for profession of law only, or of any one human science that is in the world, and advanceth itself above all others, quantum inter viburna cupressus. In which Houses of Court and Chancery, the readings and other exercises of the laws therein continually used, are most excellent

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Arts and Sciences.

excellent and behoofful for attaining to the knowledge of these laws: and of these things this taste shall suffice, for they would require, if they should be treated of, a treatise by itself. Of the antiquity of these Houses, and how they have been changed from one place to another, I may say as one said of ancient cities: *perpaucae antiquae civitates auctores suos norunt*. Now what arts and sciences are necessary for the knowledge and understanding of these laws; I say, that seeing these laws do limit, bound and determine of all other human laws, arts, and sciences: I cannot exclude the knowledge of any of them from the professor of these laws, the knowledge of any of them is necessary and profitable. But forasmuch as if a man should spend his whole life in the study of these laws, yet he might still add somewhat to his understanding of them: therefore the Judges of the law in matters of difficulty do use to confer with the learned in that art or science, whose resolution is requisite to the true deciding of the case in question. Concerning the lang. or tongue

nae aliis illustrissimam unius jurisprudentiae academiam, quae sese supra alias effert: quantum inter viburna cupressus. Porro in collegiis atque aedibus hisce singulis lectiones aliaque jurisprudentiae exercitia assidue habita praestantissima profecto sunt, & ad legum scientiam consequendam summopere conducibilia: atque de hisce rebus gustum hunc dedisse sufficiat; quas si fusius persequerer, integrum per se tractatum requirerent: antiquitatem vero aedium harum quod attinet, & quomodo de loco in locum translatae fuerint, idem dicam quod de antiquis civitatibus quidam: perpaucae antiquae civitates auctores suos norunt. Jam si quaeratur quae artes & scientiae necessariae sint ad istarum legum cognitionem atque intelligentiam, respondeo quod quandoquidem jurisprudentia haec definit ac statuit de aliis non solum humanis legibus, verum artibus & scientiis universis, profecto earum cujuslibet cognitionem a juris nostri professore non modo non excludo, sed utilem prorsus atque necessariam judico:
cum

cum vero ut quis ætatem suam omnem in studiis hisce legum conterat, aliquid semper addendum restaret quod ad plenam earum intelligentiam faceret, idcirco iudices in difficilioribus causis eorum ferè consilium in illa arte aut scientia adhibent, quorum requiri iudicium ad veram quæstionis controversæ decisionem videtur. Quod ad linguam attinet in qua conscriptæ sunt leges nostræ, iudiciorum imprimis sententiarumque formulæ ac monumenta scripta & asserta sunt Latine omnia, id quod cum ex statuto apparet lato in comitiis An. 36 E. 3. c. 15. tum e scriptis Glanvillæ, Bractonis, Fletæ, e Novis item Narrationibus, Lib. Intrationum, & variis denique statutis ipsis quæ sermone Latino conscripta atque edita sunt: ante imperium illustrissimi illius Regis Ed. I. tam rescripta omnia originalia ac judicialia, quam universi legis libri Glanvillæ Bractonis, &c. denique & statuta quæ in hunc usque diem extant omnia, lingua Latina conscripta atque edita fuerunt; postea vero in ipsius atque fi-

wherein these laws are written, for all judicial records are entered and enrolled in the Latin tongue: as it appeareth by an act of parliament in anno 36 Ed. 3. c. 15. and the works of Glanville, Bracton, and Fleta, *Novæ Narrationes*, and the Book of Entries, and divers of our statutes are set forth in the Latin tongue. Before the reign of that famous King Edward I. as well all writs original and judicial, as all the books of the law, as Glanville, Bracton, &c. and all the statutes yet extant, were published in the Latin tongue; in the reign of him and his son many statutes are indicted in the Latin: (as some also of the statutes of Rich. II. be.) And divers also be enacted in French; for that they had divers territories and seignories that spake French within their dominion, and in respect thereof the better sort learned that language. But forasmuch as the former reports of the law, and the rest of the authors of the law (the Doctor and Student, who wrote in the English tongue excepted) are written in French; I have

Law Language.
See the late stat. 4 Geo. 2. cap. 26. and Bohun's preface to the English Lawyer.

Q. The first Edition was in Latin.

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Q. de hoc.

Præf. ad L. 6.

have likewise published these in the same language: and the reason that the former reports were in the French tongue, was, for that they began in the reign of K. Edw. 3. who, as the world knows had lawful right in the kingdom of France, and had divers provinces and territories thereof in possession; it was not thought fit nor convenient, to publish either those or any of the statutes enacted in those days in the vulgar tongue, lest the unlearned by bare reading, without right understanding, might suck out errors, and trusting to their own conceit, might endamage themselves, and sometimes fall into destruction. And it is verily thought that William the Conqueror, finding the excellency and equity of the laws of England, did transport some of them into Normandy, and taught the former laws, written, as they say, in Greek, Latin, British, and Saxon tongues (for the better use of Normans) in the Norman lang. and which are at this day, (though in process of time much altered) called the customs of Normandy: so taught he the Englishmen the Nor-

lii ejus regno multæ leges (sicut & Rich. 2. statuta nonnulla) Latine scriptæ sunt, Gallicè item variæ, eoque multas possessiones magnumque adeo dominium infra regnum hoc sub imperio suo tenuit, in quibus Gallicè sunt loquuti, quo respectu supericris ferè ordinis viri eam linguam didicerunt: quandoquidem tamen juris nostri scriptores tam qui causas ac sententias retuler', quam authores ferè alii (excepto uno qui Doctoris ac Studiosi librum Anglicè composuit) lingua Gallica scripserunt, & elucubrationes hæc meas eadem lingua edendas duxi: jam quod Gallice habeantur relationes illæ veteres, in causa fuit ceperunt scribi sub imperio Edw. 3. qui ut omnes norunt, in regno Gallie plenum jus habuit; variasque ejusdem provincias ac territoria in ditione ac possessione sua tenuit: neque sanè conducere aut convenire putabatur, siue relationes illas, siue statuta alia tum sancita sermone vernaculo edere, ne imperiti homines ex nuda lectione absque vero intellectu errores inde suggerent,

rent, suisque adeo confisi ingeniis, aut damnum aliquod, aut certum aliquando perniciem incurrerent: creditur etiam (nec vana fides) Gulielmum gentis hujus subactorem, postquam legum Angliæ excellentiam atque æquitatem percepisset, earum nonnullas in Normanniam transtulisse, legesque illas veteres (scriptas (ut aiunt) Græcè, Latinè, Britanicè, & Saxonice) ad commodiorem usum Normannorum, Normannicè loqui docuisse. Quæ sanè licet longo temporis intervallo fuerint immutata, tamen vel in Hodiernum usque diem consuetudinem Normanniæ nomen atque appellationem retinent: consimili plane modo & Anglos nostros, venationis aucupii, & cæterorum ferè ludorum atque exercitiorum omnium vocabula docuit, quæ vel hodie usque manent: et tamen nemo dubitat quin intra regnum hoc, ante victoris illius tempora, ludi illi animique relationes extiterint.

Verum consule quæso præfationem illam Gulielmi de Rouil de Alen-

man terms of hunting, hawking, and, in effect, of all other plays and pastimes, which continue to this day; and yet no man maketh question but these recreations and disports were used within this realm before the Conqueror's time.

But see the Preface of William de Rouell of Alençon to his Commentary written

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written in Latin, upon the book, called *Le graund Custumier de Normandie*, entitled in Latin, *Descriptio Normanniæ*: where he sheweth and proveth by other authors, that most of the customs of Normandy were derived out of the laws of England, in or before the time of the said King Edward the Confessor, from whom William Duke of Normandy did derive the title, by colour whereof he first entered into the crown of England. If the language or style do not please thee, let the excellency and the importance of the matter delight and satisfy thee, thereby thou shalt wholly addict thyself to the admirable sweetness of knowledge and understanding: *In lectione non verba sed veritas est amanda, sæpe autem reperitur simplicitas veridica, & falsitas composita, quæ hominem suis erroribus allicit, & per linguæ ornamentum laqueos dulces aspergit: et doctrina in multis est: quibus deest oratio.* Certainly the fair outsides of enamelled words and sentences, do sometimes so bedazzle the eye of the reader's mind with their glit-

son in commentarium suum Latine scriptum ad librum, Gallicè Le graund Costumier de Normandy, Latine descriptio Normanniæ appellatum: ubi ex aliis authoribus probat & demonstrat consuetudines illas Normannicas e legibus Angliæ fuisse petitas, sive ante sive non multò post Ed. Confessoris tempora, a quo Gulielmus Normanniæ dux jus suum & titulum duxit, cujus colore regnum hoc Angliæ primo investit. Siquidem igitur relationum istarum phrasis aut stilus tibi minus arrideat, at rei ipsius subjæctæ præstantia atque utilitas & delectet & satisfaciat; unde fiet ut totum te admirabili planè dulcedini cognitionis atque scientiæ dedas & addices. In lectione non verba sed veritas est amanda, sæpe autem reperitur simplicitas veridica, & falsitas composita, quæ hominem suis erroribus allicit, & per linguæ ornamentum laqueos dulces aspergit: et doctrina in multis est, quibus deest oratio. Certè quidem species & pulchritudo exterior politorum verborum sententiarumque fucatarum. ita quan-

*Isidorus de
summo bono,
lib. 3. Valer.
lib. 8.*

quandoque lectori aciem mentis splendore suo perstringit, ut in rei ipsius viscera quasi ac medullam, penetrare atque introspicere nequeat; qui enim structorum verborum lepores & festiuitates avidè venantur, phrasumque tragicarum ac tument' luxuriant' quasi odore abripitur, sæpenumero fit ut dum ad inanem ostentationem verba conquirat, rem amittat: et sic projicit ampullas & sesquipedalia verba; verum jurisperiti nostri gravitati imprimis convenit sermone apertò, toto, conciso uti: atque de hiis hæc sufficiant.

Fecit, benevole lector, superiorum elucubration' mearum singularis sanè approbatio, novis tuis insuper associata votis, ut pauca hæc reverendissimorum judicium atque præsidium juris præstantissima sanè judicia ac decreta prælo committam: quæ quidem omnia tendunt vel ad veram quorundam generalium statutorum expositionem, vel ad librorum nostror' in quibus discrepantes opiniones occurrunt, sensum ac sententiam genuinam explican-

tering shew, as they cause them not to see or not to pierce into the inside of the matter; and he that busily hunteth after affected words, and followeth the strong scent of great swelling phrases, is many times (in winding of them in, to shew a little verbal pride) at a dead loss of the matter itself, and so *projicit ampullas & sesquipedalia verba*: to speak effectually, plainly, and shortly, it becometh the gravity of this profession: and of these things this little taste shall suffice.

Your extraordinary allowance of my last Reports, being freshly accompanied with new desires, have overcome me to publish these few excellent judgments and resolutions of the reverend Judges and sages of the law, tending either to the true exposition of certain general acts of parliament, or to the true understanding and sense of our books, wherein there seemeth some diversity of opinion; and albeit they be few in number, yet many of them consist of divers several points, and comprehend in them many other judgments and resolutions, which
never

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never before were reported. If by these labours the commonwealth shall receive any good, and the reader reap the benefit that for his reading and study he deserveth; I shall have all the reward that for my writings and pains I desire.

Vale.

dam. Et licet exiguus prorsus sit relatarum hic a me causarum numerus, latè tamen patent earum plurimæ, quæ & diversis constant membris, & multas alias sententias atque conclusiones nunquam antebac in lucem editas complectuntur: ex quibus laboribus si quidem respub. emolumentum, lector studiorum suorum condignum fructum perceperit, existimabo me elucubrationum mearum amplum sanè præmium consequutum.

Vale.

The Marquis of WINCHESTER's Case.

Trin. 25 Eliz. Between the Queen and
the Marquis of Winchester, which
began Mich. 21 & 22 Eliz.

THE Queen brought a writ of (a) error against the Marquis of Winchester, the effect of the writ was, that John Horne, and others, by their deed bearing date the 10th day of July, *an.* 6 H. 8. gave to Lionel Norreis, Esq. and to one Anne Milles, the manor of Merleston with the appurtenances in Merleston in the county of Berks, to have and to hold to the said Lionel and Anne and to the heirs of the body of the said Lionel; and for default of such issue, the remainder to Henry Norreis, and to the heirs male of his body: and that *Term. Pasch.* 19 H. 8. the Marquis of Winchester and divers others did recover (in the life of the said Anne) the said manor of Merleston in Merleston against the said Lionel, in a writ of entry in the Post, in which the said Lionel did vouch one Thomas (b) Chappian, then the common vouchee, and judgment was given and execution had according to the usual form of common recoveries: and afterwards the said Henry Norreis (having issue Henry, now Lord Norreis of Ricote who is now living) *Pasch.* 28 H. 8. was attainted of high treason; and afterwards, the 22d of May in the same year, was executed. And afterwards, at a Parliament held the 18th day of June in the same year, it was enacted, that the said Henry Norreis the father, for divers treasons by him committed, should forfeit to the said King Henry VIII. his heirs and successors, all such manors, messuages, lands, tenements, rents, reversions, remainders,

(a) 1 Leon. 270.
Moor 95. 125,
323. Co. Ent.
240. nu. 5.

(b) Cro. El. 2.

uses, possessions, offices, rights, conditions, and all other his hereditaments which he, or any other person to his use, then had or ought to have, of any estate of inheritance in fee-simple, fee-tail, in use or in possession the day of his treasons committed, or at any time after : and afterwards the said Lionel died without issue of his body ; and afterwards the said Anne died ; and thereupon the Q. brought a writ of error against the Marquis of Winchester, the heir of the survivor of the recoverors ; and the error which was assigned was, because the original writ entry of in the Post failed, and the record, which was removed out of the Common Pleas, was of the manor of Merleston *cum pertin'* in general, and not restrained to any town. And the said Marquis, in bar of the said writ of error, pleaded, that after the attainder of the said H. N. the father, the Q. that now is (if she had any right to any writ of error in the case afores.) by her letters patent, bearing date in the 14th year of her reign, of her special grace, certain knowledge and mere motion, did give, grant, and restore, for her and her successors, to the said Henry Lord Norreis the said manor *cum pertinentiis* ; and also all her right, estate, title, claim, interest and demand in the said manor, to have and to hold to him and his heirs. And upon this plea Popham the Q's Attorney did demur in law. And this case was argued by Popham the Queen's Attorney, and Egerton the Queen's Solicitor, in maintenance of the writ of error ; and by Plowden and Coke for the defendant. And the defendant's counsel took five exceptions to the writ of error.

1. That the writ of error was brought to reverse a judgment for all the manor, where it should be but of a moiety, for it appears by the writ, that the recovery was void for a moiety because Anne Milles (a) the other joint-tenant was not named with Lionel in the writ, by which one moiety was forfeited to the Queen by his attainder, which the Queen by her letters patent hath granted over to the said Lord Norreis, and so forasmuch as the (b) register hath one form of writ for the whole, and another form for the moiety, three parts, &c. this writ brought of the whole, where it should be brought of the moiety, ought to be abated. And principally, as it was said, by one of the defendant's counsel, because it comes of the plaintiff's own shewing, and not by the shewing of the other side, nor by the finding of a jury, as in (c) 36 H. 6. 27. b. it is agreed, that in maintenance if it appear by the (d) shewing of the party himself, that the maintenance be several, the writ shall abate ; otherwise, if it be found by verdict. *Vid.* 10 E. 4. 8. 11 H. 7. 6. 11 Aff. 9. 19 Aff. 14. 22 Aff. 86.

The second exception was, because it was not shewn that Henry Norreis, to whom the remainder was limited, had the remainder at the time of the recovery, for the gift in tail was made in 6 H. 8. and the recovery

was

(a) Cro. Jac.
333.

(b) 1 Rol. Rep.
306.
(c) 11 Co. 5. b.
Fitz. Maint. 15.
Br. Maint. 26.
Br. Br. 245.
(d) Cr. El. 30.
325. Cro. Jac.
70, 104. Hob.
164, 199, 251.
279. Yelv. 71.
Styl. 15. 1 Leon.
41. 3 Leon. 77.
11 Co. 45. a.
1 Rol. Rep. 35.
77. Palm. 524.
1 Brownl. 68.
1 Sand. 285.

was in 19 H. 8. and no continuance of estate, either of the estate-tail in possession, or of the remainder, is alledged; and that the said estates shall not be intended to continue, the books in 7 H. 7. 3. Stradling's case. Plowd. fol. 199, (b) & 10 H. 7. 28. in Henbade's avowry, were cited. (b) Br. Pleading 167.

The third exception was, because the (c) record of the recovery was of the manor of Merleston *cum pertinentiis*, and the writ of error was to remove a recovery of the manor of Merleston in Merleston *cum pertinentiis*, and so the true record was not removed by the said writ of error, as in the like case is agreed in (d) 9 H. 6. 1. a. b. where it is said, that in all cases where a man is to execute a record, or to defeat a record, there, no variance ought to be between the writ and the record, and with that agree the books in 7 (f) Aff. 5. and (g) 26 Aff. 31. in case of attainit. (c) 1 Roll. 752. 2 Sand. 291, 292. (d) Fitz. Variance 6. Br. Variance 6. 2 Bulstr. 169. (e) 1 Roll. Rep. 16. 2 Bulstr. 169. 3 H. 6. 16. a. Br. Variance 3. Godb. 249. (f) 2 Bulstr. 169. Br. Variance 92. (g) Br. Brief, 288.

The fourth exception was, because the act of 28 H. 8. upon which the writ of error was founded, gave to the King all the manors, &c. which the said Hen. Norreis then before attainted had the day of his treason committed, or at any time after; and it is not shewed when the treasons were committed, nor that then he had any thing in the manor, which ought to have been averred precisely, as it is agreed in Nichol's case, in Plow. Com. 485 b.

The last exception was, because although all the rights, &c. hereditaments, &c. which the said Henry Norreis had, &c. were given to the King, yet it doth not appear without office, whether he had any right to this manor: and note, that although after the said Henry Norreis was executed, so as by reason of his attainder he died without heir, yet this writ of error cannot be in the King without office, for by the common law such hereditam. as a writ of error shall not be forfeited, nor can escheat, and therefore this case is out of the reason of the book in 19 H. 7. for there the land escheated, and a freehold cannot be in (i) suspence. But the court did not deliver any opinion touching any of these exceptions to the writ of error, but only that it was unanimously agreed, that by this writ of error the record of the recovery was removed into the King's Bench; for judgment was given against the Queen upon the substance of the matter. And in this case two points were unanimously resolved by Sir Christopher Wray Chief Justice, and Sir Thomas Gawdy, Knt. and the whole Court of King's Bench.

First, that this writ of (k) error was not given to the King by any of the words of the said act of 28 H. 8. for three causes, first, because in this case, the terre-tenant is *in* by title, and the entry of the person attainted is not congeable; and therefore this right of action, if he had any, was not given to the King by any of the said words. So if the said Henry Norreis the father had right of formedon in the descender, after (i) Postea 10. b. 20. a. (k) 2 Roll. Rep. 374. 7 Co. 13. a. 1 Leon. 271. 272. Moor 125, 323. Lit. Rep. 100. Cro. Fl. 389. Owen 21.

(a) Hob. 242,
341.

(b) Co. Lit. 368,
372. b.

2 Rol. Rep.

339, 507.

(c) 1 Rol. 816.

Palm. 353.

(d) 3 Keb. 244.

Styl. 81.

(e) 2 Rol. Rep.

314. Postea 11. a.

Hob. 242, 243.

10 Co. 48. a.

Cro. Car. 428,

429.

Rep. Q. A. 84.

(f) Hob. 341.

(g) 31 H. 8. c. 13.

(h) Cro. Car.
428.

(i) 3 Inst. 19.

Palm. 356, 439.

1 Jones 76.

2 Rol. Rep. 319,

324, 325, 420,

501. Hob. 241.

10 Co. 48. a.

(k) 1 Jones 77.

Postea 11. a.

(l) Palm. 439.

3 Inst. 19.

7 Co. 13. a.

(m) 1 Co. 121. b.

(n) Palm. 439.

3 Inst. 19.

discontinuance made by his father; or if Henry the father had been disseised, and the disseisor had died seised before the said act, such (a) right of action was not given to the King by any of the said words; but if the act had been made after the disseisin, and before the descent, such right had been given to the King by the said act: for the Justices said, that such right, for which the party had no remedy but by action only to recover the land, is a thing which consists only in (b) privity, and which cannot escheat, nor be forfeited by the common law, (c) 3 R. 2. *Entre congeable* 38. 32 H. 6. 27. 2 H. 4. 8. 7 H. 5. 9. 7 H. 4. 6. & 17. 21 E. 3. 47. a. 27 Aff. 32. 49 E. 3. 13. 49 Aff. 4. F. N. B. 144. Stamford 188. So that by the (d) general words of an act of attainder all (e) rights, &c. and heredit. &c. (although in truth the party attainted had a right, which also is an hereditament) shall not be given to the King; for it would be very vexatious and inconvenient, that estates of purchasers and others, after many descents and long possession, should be impeached at the King's suit, by such general words, against the reason and rule of the common law, where all the words may by reasonable intendment be well satisfied, *scil.* such rights, &c. which may lawfully escheat, or be forfeited. And it was observed by the Justices, that by no act of attainder that ever hath been made, actions were given but (f) rights of entries, &c. Also the statutes of 27 H. 8. & 31 H. 8. (g) of monasteries, and the statute of 1 E. 6. of chauntries, give to the King all rights, entries, &c. which give not actions to the King. And therefore it was agreed by the court, that a (h) right of action after discontinuance, descent, &c. where the entry was not lawful, was not given to the King by the general words of any of the said acts. And so, it was said, have the said statutes always been expounded. The same construction hath been made upon the statute of 33 H. 8. cap. 28. by which it is enacted, "That the King's Majesty, his heirs and successors, shall have as much benefit and advantage by such attainders of treason, as well of uses, rights, entries, conditions, as possessions, reversions, remainders, and all other things, as if it had been done and declared by Parliament." That a (i) right which consists only in action, where the entry is tolled, is not given to the King by that act.

It was also agreed by them, that before this act of (k) 33 H. 8. by the general words of any act of attainder of all hereditaments, a condition was not given to the King; and therefore by the same act, by express words, conditions are given to the King, and yet without question a (l) condition is an hereditament. Also although an use were an hereditament (for there shall be a (m) *possessio fratris* of it) yet by the general words of all hereditaments, an (n) use was not given to the King by any act of attainder, but neither the condition

dition, nor the use, were things forfeitable by the common law; and therefore by the general words of all hereditaments, they were not given to the K. by any act of attainder. Note a diversity between inheritances and chattels; for as it hath been said, a right of action concerning inheritances is not (a) forfeited by attainder, but obligations, statutes, recognifances, &c. and other such things in action are forfeited to the King by attainder or outlawry. And it was agreed by the whole court, that if Lionel had made a feoffment in fee, without warranty, that had been a discontinuance for a moiety, for by the feoffment the jointure was severed. And note, that in this case at bar, conditions and uses are given by exprefs words, for the makers of the act knew, that they would not be given by the general word of hereditaments.

The second resolution was, that in this case, Henry Norreis had not any right in the moiety of the said manor, for although the recovery were erroneous for want of an original (for it was agreed it was not void, but voidable by error) yet notwithstanding as long as the recovery stood in its force, he in remainder had not any right to the remainder in respect of the intended recompence, but till the recovery be reversed by writ of error, the remainder is barred for one moiety, and he in remainder hath not any right in it. And therefore, if tenant (b) in tail suffer a common recovery erroneously, and afterwards disleises the recoveror, and dies, his issue shall not be remitted, for as long as the recovery remains in its force, the estate-tail is barred, *quod fuit concessum per totam curiam*. And it was said by one of the defendant's counsel, that neither (c) action without right, nor right without action with a descent, &c. shall make a remitter; the first is apparent, and resolved by the court in the case at bar. As to the second it was said, that a man shall never be (d) remitted, but where, if the right and possession were in several persons, he who had the right might have an action to recover the possession. And that appears by (e) Littleton 147. for he saith, that one of the principal causes for which the estate in tail shall be remitted is, because there is no person against whom he can bring his writ of *formedon*, &c. and for this cause the law adjudges him in his remitter, in such plight as if he had lawfully recovered the same land against another, 5 H. 7. 38. a. (f) A man shall not be remitted to an advowson appendant although he hath right to it before he hath recontinued the manor to which, &c. because before he hath recovered the manor he hath no action to recover the advowson. So if a man purchase an advowson in fee, and suffers an usurpation and 6 months to pass, now he hath right, but forasmuch as he hath no remedy for it, he shall never be remitted to it, although the advowson be cast upon him, either by descent, or any other act in law, & sic de jmilibus. And it was resolved by the court, that inasmuch as in the principal case Henry had no right,

Hardr. 488, 490.
Stamf. 188.

(a) Cro. Jac. c13.
Hob. 214. 2 Rol.
807. Godb. 315,
316. Palm. 353.
Stamf. Cor.
188. a.

(b) Co. Inf.
349. b. 10 Co.
38. a.

(c) Co. Lit. 349.
b.

(d) 6 Co. 58. b.
Co. Lit. 349. a. b.

(e) Co. Lit.
sect. 661 Co.
Inst. 349. a. b.

(f) 2 Rol. Rep.
417. Co. Lit.
307. a. 333. b.

(a) 2 Rol. Rep.
374. 1 Leon.
271, 272.
Mo. 125, 323.
Lit. Rep. 100.
Cro. Eliz. 389.
Owen. 21.
7 Co. 13. a.
(b) Mo. 312,
322, 530, 531.
Fitz. Grant. 70.

(c) 7 Co. 13. a.
Mo. 312, 322.

Co. Lit. 187.

1 Co. 76. b.
F. N. B. 98.
21 E. 3. 20.

Co. Lit. 186.

(d) 1 Rol. Rep.
301. Bridgm. 71.
Palm. 237, 345.
Dy. 188. pl. 8.

a fortiori this writ of (a) error being a bare action, which consists more in privy than an action which is accompanied which a right, is not given to the King by the general words of the said act. It is adjudged in *Pasch.* 3 E. 3. (47) 74. that whereas all the possessions of the (b) Templars were by act of Parliament, *anno* 17 E. 2. given and transmitted to the Hospitallers, to hold them in the same manner as the Templars held them, yet they had not by the said general words a rectory which was appropriate to the Templars; for that was an inheritance inseparably in privy annexed to them. So it is held in 35 H. 6. 56. that upon the said words of the said act, to hold them as the Templars held them, they shall not hold by (c) frankalmoigne, because that tenure consists only in privy, and for that cause without special words, it shall not, against the rule and reason of the common law, be created. The same law of a writ of error. And although Anne Milles was jointly seised with the said Lionel for her life, so that as well Lionel as the vouchee might have abated the writ, yet when the vouchee, without demand of any lien, enters generally into the warranty, and thereby admits the writ good, and Lionel recovers in value against the vouchee, who enters according to the estate of him who voucheth, with the remainder over: for this cause it was resolved, that for one moiety the recovery shall be a bar to the estate-tail, and to the remainder also, because by the recovery against Lionel, the jointure was severed. And it was said, that common recoveries, as much as any benign interpretation of the law will permit, ought to be maintained, because they are the common assurances of the land. But it was agreed, that for the other moiety whereof Anne Milles was tenant for life, the recovery was not any bar either to the estate-tail, which Lionel had expectant upon the estate of Anne Milles, or to the remainder of Henry, because for this moiety Lionel was not tenant to the *præcipe*; but the recovery had its operation against him by estoppel and conclusion, which shall not bind the issue in tail who claims *per formam doni*.

The third cause was, because Henry at the time of his attainder was not intitled to have any writ of error. And as to that, it was agreed, that he who has a remainder expectant upon an estate-tail, shall have a writ of (d) error upon a judgment given against tenant in tail, altho' there were no such remainder at the common law; for when the statute *de donis conditionalibus* doth enable the donor to limit a remainder upon an estate-tail, all actions, which the common law gave to privies in estate, are by the same act as incidents *tacite* given also, according to the rule of the common law; and therefore those in reversion or remainder expectant upon an estate

estate for life, had a writ of error by the common law, upon a judgment given against tenant for life, although they were not made parties by aid prayer, voucher, or receipt: so, after the statute of *de donis conditionalibus*, shall he have, who hath a reversion or remainder expectant upon an estate-tail. 2. It was agreed by them, that in none of the said cases, he in reversion or remainder, who was not party to the first record by voucher, &c. shall have any writ of (a) error by the common law, till after the particular estate determined, for then he in reversion or remainder ought to have the land in possession, and take the profits; but if he in reversion or remainder be made a (b) party to the record by aid prayer, receipt, or voucher, then he shall have a writ of error presently, during the life of the tenant for life, in respect that he was made party to the record. *Vide* 4 Aff. 7. 17 Aff. 24. 18 E. 3. 25. 20 (30) E. 3. Error 2. 32 E. 3. Error 73. 43 Aff. 41. 8 H. 4. 4. 21 H. 6. 29. 22 E. 4. 31. F. N. B. 21. c. 99. e. And by the said differences you may reconcile all the said books, and many other, betwixt which, to some who observe not the said distinction, seems to be contrariety; but when an erroneous judgment was given against tenant for life, by that his reversion or remainder was divested, so that he could not grant or transfer it by any means to another. And it was doubted he could not punish any waste committed after the recovery, and divers other mischiefs, and yet he had no remedy to reverse it during the life of the tenant for life. 45 E. 3. 21. b. 8 H. 6. 13 b. F. N. B. 60. b. for waste. For remedy of which mischiefs, the statute of (c) 9 R. 2. cap. 3. was made, by which it is provided, that if tenant for life, tenant in dower, tenant by the curtesy, or tenant in tail after possibility of issue extinct, lose in a *præcipe*, &c. that he in reversion, his heirs or successors, shall have an (d) attain or a writ of error, as well in the life of such tenants, as after their deaths, and that the tenant for life, if the judgment be reversed, shall be restored to his possession of the tenements so lost, with the profits in the mean time, &c. Provided always, that if the party suing will alledge that the tenant was of covin and assent with the demandant, who recovered, that such tenements should be lost, that then, although such tenants be living, yet restitution shall be made to the party suing of the possession, with the mean profits, &c. upon which act two points were resolved by the court.

First, that although the statute speaks only of reversions, yet remainders are also taken to be within the purview thereof.

A 4

Secondly,

(a) Dyer 188.
pl. 1. Cr. Eliza.
289. Cr. Jac.
333. F. N. B.
99. e. 21. m. c.
22 E. 4. 31. a.
2 E. 4. 27. b.
Palm. 253.
(b) Rol. 748.
4 E. 3. 53. 54.

(c) 4 Inst. 51.
Dyer 2. pl. 5.
90. pl. 5.
Bridgm. 71.
Cr. Eliz. 289.
F. N. B. 99. c.
Owen 149.
2 Bulst. 15.
10 Co. 44. b.
Palm. 251, 253.
(d) F. N. B. 108.
a. Post. fol. 61. a.
Reg. 122.

(a) 1 Leon. 272.
10 Co. 45. b.

(b) 1 Jones 423.

(c) Cr. Car.
535.

(d) Post. fol.
61. a. 10 Co.
44. b.

(e) 1 Co. 15. b.
2 Co. 74. a.
2 Leon. 60. 61.
66. 4 Leon. 124.
126, 128, 131.
Co Lit. 356. a.
262. a. Br. Entre
congeable 49.
Br. Forfeiture de
terre 29.
1 Rolle's 853.
10 Co. 44. a.
Moor 271.
1 And. 227.

(f) 7 Co. 13. a.
Post. 11. a.
1 Jones 370.
Godb. 378.
(g) 1 Leon. 271.
Hob. 243. Cro-
mer's Case.
8 Reg. Eliz.

Secondly, that a reversion or remainder (a) expectant upon an estate-tail is out of the words, and also out of the meaning of the said act. For in as much as the makers of the act, by (b) special words, have provided remedy for those in reversion expectant upon estates for life, or in dower, or by the curtesy, or in tail after possibility of issue extinct, by this precise enumeration of those four particular estates for life (*vide* 33 H. 6. 22. the like point in case of receipt) their meaning appears to (c) exclude reversions and remainders expectant upon estates-tail, and they had good reason for it; for an estate-tail is an estate of inheritance, and therefore it was not reasonable to give him in reversion or remainder expectant on such estate, a (d) writ of error during the continuance of such estate, which by possibility may continue for ever. Note reader, upon the proviso of the said act, that if tenant for life suffers a recovery in a *præcipe* by covin and assent, if he in reversion or remainder reverses the recovery, he shall be restored to the possession and mean profits: *unde colligo*, that the Parliament did adjudge such recovery by covin and assent (e) a forfeiture. For otherwise it would be hard to restore him not only to the possession, but also to the mean profits; and with that agree the books in 5 Aff. 3. 14 E. 3. Receipt 135. 22 Aff. 31. 9 H. 5. 14. Now forasmuch as it appears in the case at bar, that Lionel survived Henry, who was in remainder, it was resolved, that Henry had but a possibility to have a writ of error, that is to say, if Lionel had died without issue in the life of the said Henry, and because Lionel survived him, that possibility was destroyed. Also no word of the said act doth extend to give a possibility to the King. Secondly, admitting in this case the writ of error had been given to the Queen, yet it was resolved, that by the general grant of the said manor of Merleston, and of all her interest, claim and demand in it, although it were made *de gratia speciali*, & *ex certa scientia*, & *mero motu*; that the writ of (f) error did not pass, because if the King could grant it, it must be by his prerogative, for no common person can do it; and therefore it ought to be granted by express and precise words. And it was said, it was adjudged in (g) Cromer's case, 8 Eliz. That where by the attainder of a disseisee, a right to certain land escheated, and was forfeited to the Queen, and after the death of the disseisee, the Queen, by her letters patents *de gratia speciali*, *ex certa scientia*, & *mero motu*, granted all the lands, tenements, rights and hereditaments which she had by the attainder of the disseisee, that in that case such a bare right should not pass by the said general words of the King; but if it could be granted at all, it ought

to have been granted with a special recital by exprefs and special words; which case was affirmed to be good law by the whole court. And therewith agrees 33 H. 8. Br. (a) chose in action 14. If an Abbot before the dissolution was disseised, and the King after the dissolution granteth over the land by general words, this right shall not pass. And Sir Christopher Wray said, that he had conferred with the Lord Anderson, Chief Justice of the Common Pleas, and Sir Roger Manwood, Chief Baron of the Exchequer, and divers other Justices, and they were unanimously of their opinion. And afterwards, forasmuch as it appeared to the court, that the said common recovery was erroneous for want of an original; for that cause a special judgment was entered, that is to say, because upon the matter, no writ of error in this case was given to the Q. *Ideo domina regina nihil capiat per breve.*

Note reader, for the said point of com. recovery there was a case in the Common Pleas, Trin. 27 Eliz. Rot. 276. between (b) Owen and Morgan, and the case was such; George Owen brought a *Scire facias* against Edw. Morgan, to execute a remainder of certain land limited to him by fine, and shewed, that Rice Owen was seised of the said land in fee, and levied a fine thereof to Rich. Owen and Thomas Monington, and to the heirs of Richard, who granted and rendered it to the said Rice and Lettice his wife, (who was not party to the writ or conufance) and to the heirs of the body of the said Rice; and Lettice died, and afterward Rice died without issue, wherefore he prayed to have execution. The defendant pleaded in bar a common recovery had against the said Rice as tenant, with voucher over of the common vouchee, which recovery was to the use of the defendant and his heirs, and that Rice survived Lettice: the plaintiff replied and said, that the said Lettice was alive at the time of the said recovery, upon which the defendant did demur in law. And it was adjudged for the plaintiff. And in that case two points were resolved.

1. Although Lettice was not party, either to the writ or to the conufance, and although it appeared in the same record that she was a stranger, and not party; yet the grant and rend. by fine to her was not (d) void, but voidable by error.

2. That this recovery against the husband only, should not bind the remaind. for between husband and wife there are no moieties, and the husband hath not power to sever the jointure, nor to dispose of any part of the land; and he during the wife's life is not seised by force of the tail, and by no act that he can do, can he execute it for any part; so that the *præcipe* being brought against him alone, the recompence cannot for any part enure to the estate-tail, or to the remainder, for to the whole estate it cannot enure, because the wife had a joint estate with him in possession at the time

of

Owen and Morgan's Case. Trin. 27 Reg. Eliz.

(b) 2 Rol. 395.

Moor 210.

Postea 6. b.

1 And. 162.

Gould. 26.

1 Jones 324.

10 Co. 46. a.

Cr. Car. 321.

4 Leon. 26, 93, 222.

(c) Co. Lit.

353. a. 373.

21 E. 3. 27. b.

pl. 24.

(d) Kelw. 19. b.

Cr. Car. 321.

1 Siderf. 83.

Post. 6.

Co. Lit. 26.

Wing Max.

767.

(a) 1 Leon. 272.
10 Co. 45. b.

(b) 1 Jones 423.

(c) Cr. Car.
335.

(d) Post. fol.
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2. That this recovery against the husband only, should not bind the remaind. for between husband and wife there are no moieties, and the husband hath not power to sever the jointure, nor to dispose of any part of the land; and he during the wife's life is not seised by force of the tail, and by no act that he can do, can he execute it for any part; so that the *præcipe* being brought against him alone, the recompence cannot for any part enure to the estate-tail, or to the remainder, for to the whole estate it cannot enure, because the wife had a joint estate with him in possession at the time

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Co. Lit. 26.

Wing Max.

767.

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Co. Lit. 187.

of the recovery who was not party to it, and for a moiety it cannot be good, for there are no moieties between husband and wife, and the estate of him in remainder doth depend upon the entire estate made to the husband and wife, and not upon any estate made to the husband alone, or which rests in the disposal of the husband for any part; and therefore the recompence recovered only by the husband in this case, cannot enure to him who hath the remainder which depends upon a joint and undivided estate made to the husband and wife, and the jointenancy between the husband and wife, cannot be severed by the judgment against the husband and although the husband hath the sole estate of inheritance, yet because by no possibility it can be executed, nor the jointure severed during the wife's life, for this cause it is as much as if the husband had had a remainder in tail expectant upon an estate for life; in which case a common recovery had against him shall not bind, because he was not tenant to the *præcipe*, nor seised by force of the tail, but the recovery as to the estate-tail of the husband took its effect by estoppel and (a) conclusion: and therewith agrees (b) 12 E. 4. 14. b. that against a common recovery against the ancestor in tail, the issue may say, that the ancestor was not tenant *tempore brevis*.

(a) Postea 51. a.
(b) Fitz. Faux-
fier de recovery
19. Br. Fauxfier
de Recovery 30.
Br. Brief 374.
Moor 256, 634.
8 Co. 77, 78.
3 Co. 59. 33 E.
3, 4, 5.
(c) Br. Remit-
ter 35
1 Co. 87. b.
(d) Br. Tail 36.
Cr. El. 670,
828.
(e) 1 And. 44.
2 Rol. 395.
3 Lev. 108.
4 Co. 2. b.

Also if tenant in tail do discontinue the tail, and take back a new estate-tail to himself, and afterwards a writ of right is brought against him, and he vouch the com. vouchee, and judgm. be given accordingly; in this case it is adjudged, *scil.* in (c) 12 E. 4. 19. (d) 14 E. 4. 1. a. that the issue in tail shall not be barred for the first intail, because his father was not at the time of the recovery seised by force of that intail, in lieu whereof recompence can enure: so (e) if land be given to the husband and wife, and the heirs of their two bodies begotten, and the husband alone suffers a com. recovery, it shall not bind the estate-tail *causa qua supra*. And although the husband, who suffered the com. recov. in the principal case of Morgan and Owen, survived the wife, it is not material, for the law will adjudge upon the case, as it was at the time of the recovery.

CUPPLEDIKE's Case.

Note Reader, for this Point of a common Recovery, there was another Case resolved, *Pasch.* 44 *Eliz.* in the Court of Wards, between Thomas Cuppledike, the Queen's Ward, plaintiff, and Edward Cuppledike, Defendant; and the Case was such, &c.

Cuppledike's
Case, p. 44.
Reg. Eliz.
2 Rol. 395.
Co. Lit. 372. b.

FRANCIS CUPPLEDIKE and Elizabeth his wife were seised of the manor of Harrington in the county of Lincoln, to them and to the heirs males of the body of Francis, the remainder to Thomas Cuppledike, father of

Thomas Cuppledike, now ward to the Queen, in tail, with a remainder over in tail, the reversion to Francis and his heirs: Francis levied a fine, Oct. Mich. 36 & 37 Eliz. to Thomas Seaton, and Rob. Becket, and to the heirs of Thomas, to the use of them and their heirs: Hil. 37 Eliz. Curtise and Dudley, by writ of entry in the post, recovered against Seaton, and Becket the said manor, who vouched Francis only, who (a) vouched over the common vouchee, and judgment and seisin had accordingly, the said Eliz. then being alive, which recovery was to the use of Francis for life, and after to the use of Eliz. for life, and after to the use of Francis and his heirs. Francis by his will in writing devised the said manor to the said Edward Cuppledike, and died without issue male: and now the question was, whether by this common recovery, the remainder in tail were barred or not, forasmuch as the wife, who had an estate with Francis, was not vouched. And after argument before the two Chief Justices, Popham and Anderson, Pepper surveyor, and Hesketh attorney of the Court of Wards, it was resolved, that this recovery should bind the remainder, for here was a lawful (b) tenant to the *præcipe*; and although Francis who had the estate-tail be only vouched; and not Eliz. who had a joint estate with him, yet Francis coming in as vouchee, he comes in in privity of the estate-tail, and not of any other estate, and the recoveror in value gave recompence to the tail which Francis had, and to the remainders over: so it was held, if A. (c) tenant in tail, the remainder to B. in tail, the remainder to C. in tail, the remainder to D. in fee, A. makes a feoffment in fee, the feoffee suffers a common recovery in which B. is vouched, and he vouches the common vouchee, in this case A. is not bound, but B. and all the remainders over barred: for although by the feoffment of A. all the the remainders were discontinued, and the estates which B. C. and D. had, became converted to mere rights; and although the remainders can never be remitted before the estate-tail in possession be recontinued; yet in case of a com. recovery, which is the com. assurance of the land, he who comes in as vouchee shall be in judgm. of law in in privity of the estate which he had, although the precedent estate, upon which the estate of the vouchee depends, be divested or discontinued.

So in the case at bar, although the estate of the wife be not recontinued, yet the husband as vouchee, shall be in judgm. of the law in of his estate-tail; and the case is the stronger, forasmuch as the estate of the wife was put to a right, so that now the husband comes in as sole tenant in tail, and cannot be jointly seised with his wife, forasmuch as she is not vouchee, and cannot be in of another estate, because once he had an estate-tail, and now comes in as vouchee: but if the husb. and wife

(a) Co. Lit.
372. b.

See 1 Salk.
568, 569.

(b) 6 Co. 32. a.
2 Rol. 295.

Hob. 25, 26.
1 Co. 122. b.

(c) Hob. 338.
Hettl. 156.
2 Rol. Rep.
506. Raym. 29.

1 Salk. 568.

(a) Hetl. 156.
Hob. 338.

(b) Hetl. 156.
Hob. 338.

(c) Cro. El. 21.
670.

(d) Antea 5. a.
2 Rol. 395.
Moor 210.
1 Anderf. 162.
Goldsb. 26.
1 Jones 324.
10 Co. 46. a.
Cro. Car. 321.
4 Leon. 26, 93.
222.
(e) 10 Co. 46. a.
2 Rol. 395. Dy.
252. pl. 97, 98.
Postea 60. b.

(f) 2 Rol. 395.
Cro. Eliz. 670.

wife had had a joint estate to them, and to the heirs of their bodies, with the remainders over, and the husband only had been vouched, there it may be doubted if the estate tail shall be barred, because the wife had a joint estate of inheritance with him; but here the inheritance was only to the husband. And the case which Plow. puts *arguendo*, in Manxel's case, fol. 8. b. That if a (a) gift be made to J. and to the heirs males of the body of his wife begotten, and he hath issue a son, and afterwards the wife dies, and he discontinues, and takes an estate to him and to the heirs females of the body of his second wife, and afterwards discontinues again, and taketh an estate back to him, and to the heirs females of his body, and afterwards discontinues again, against which last discontinuee a common recovery is had, in which the tenant in tail is vouched, and vouches over the common vouchee, and afterwards dies, and his three issues bring several *formedons* in the descender, they shall be all barred by the said recovery; for in judgment of law, when he generally enters into warranty, he comes in of all his several estates, which shall be all barred in respect of one and the (b) same recompence, was agreed to be good law by the two Chief Justices; but the opinion of Plow. in the other point, if tenant for life be, the remainder or reversion over in tail, that if a common recovery be had against him in remainder or reversion, it shall bar the estate-tail, was (c) denied by them all; for there is no tenant to the *præcipe*, but only by admittance and conclusion, which shall not bind the issue in tail. And this case at the bar is not to be likened to the said case of (d) Owen and Morgan, for in this case those, against whom the *præcipe* is brought, are lawful tenants to the *præcipe*; and when the husband, who hath the estate-tail only is vouched, he comes in as sole tenant in tail, and all the estate is in him, and nothing then remains in the wife but a right, and when he who hath the estate-tail is vouched, he cannot be in of another estate, being vouchee, as it appears before. *Vide* 8 Eliz. Dyer 252. b. (e) Kniveton's case, which in effect was, that tenant for life, and he in remainder in tail suffered a common recovery, in which they both vouched the common vouchee, it shall not bind the tail, for he in remainder in tail is not tenant to the *præcipe*, but the tenant for life, and in truth the land is recovered against the tenant for life only, and the recompence cannot vest in him in remainder only, forasmuch as the land is in truth recovered against the tenant for life, and he in remainder was never seised by force of the tail. And according to this it was adjudged in the Common Pleas, between (f) Leach and Cole, in *replevin*, M. 41 & 42 Eliz. Rot. 1703.

HEYDON's Case.

Pasch. 26 Eliz. But the Plea began *Pasch. 20 Eliz. Rot. 140.* in the Exchequer.

(a) **I**N an information upon an intrusion in the Exchequer, against Heydon, for intruding into certain lands, &c. in the county of Devon: upon the general issue, the jurors gave a special verdict to this effect:

First, they found that parcel of the lands in the information was ancient copyholds of the manor of Ottery, whereof the Warden and Canons regular of the late college of Ottery were seised in the right of the said college; and that the Warden and Canons of the said college, 22 H. 7. at a court of the said manor, granted the same parcel by copy, to Ware the father and Ware the son, for their lives, at the will of the lord, according to the custom of the said manor; and that the rest of the land in the information was occupied by S. and G. at the will of the Warden and Canons of the said college for the time being, in the time of H. 8. And further, that the said S. and G. so possessed, and the said Ware and Ware so seised as aforesaid, the said Warden and Canons by their deed indented, dat. 12 Jan. anno 30 H. 8. did lease the same to Heydon the defendant, for 80 years, rendering certain rents severally for several parcels; and found that the said several rents in Heydon's lease reserved, were the ancient and accustomed rents of the several parcels of the lands, and found, that after the said lease they did surrender their college, and all the possession thereof, to King H. 8. And further found the statute of (b) 31 H. 8. and the branch of it, *scil.* by which it is enacted, "That if any Abbot, &c. or other relig. and eccles. house or place,

(a) Moor 123.
Co. Ent. 372.
nu. 10. 1 Leon.
4. 333. 4 Leon.
117. Sav. 66.
9 Co. 105. a.
2 Inst. 505.

(b) 31 H. 8. c. 13.

" Place, within one year next before the first day of this present parliament, hath made, or hereafter shall make any lease or grant for life, or for term of years, of any manors, messuages, lands, &c. and in the which any estate or interest for life, year or years, at the time of the making of such grant or lease, then had his being or continuance, or hereafter shall have his being or continuance, and not determined at the making of such lease, &c. Or if the usual and old rents and farms accustomed to be yielded and reserved by the space of twenty years next before the first day of this present parliament, is not, or be not, or hereafter shall not be thereupon reserved or yielded, &c. that all and every such lease, &c. shall be utterly void." And further found, that the particular estates aforesaid were determined, and before the intrusion Heydon's lease began; and that Heydon entered, &c. And the great doubt which was often debated at the bar and bench on this verdict, was, whether the copyhold estate of Ware and Ware for their lives, at the will of the lords, according to the custom of the said manor, should in judgment of law be called an estate and interest for lives, within the said general words and meaning of the said act. And after all the Barons openly argued in court in the same term, *scil. Pasch.* 26 Eliz. and it was unanimously resolved by Sir Roger Manwood, Chief Baron, and the other Barons of the Exchequer, that the said lease made to Heydon of the said parcels, whereof Ware and Ware were seised for life by copy of court-roll, was void; for it was agreed by them, that the said copyhold estate was an estate for life, within the words and meaning of the said act. And it was resolved by them, that for the sure and true (a) interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered.

(b) 1. What was the common law before the making of the act?

(a) Moor 128.
Sav. 66. 6. Co.
37. b. Cro. Car.
45. 83.
(b) Poph. 74.

(c) 2 Rol. Rep.
99.

(d) Hard. 27.
2 Rol. Rep. 314.
Cro. Car. 83.
533. Co. Lit.
381. b. 1 Co.
123. a. 11 Co.
73. b. 2 Siderf.
41. 2 Bulst. 187.
Hob. 97. 1 Rol.
Rep. 162, 166.
Cro. Argument
40.

(c) 2. What was the mischief and defect for which the common law did not provide?

3. What remedy the parliament hath resolved and appointed to cure the disease of the commonweath?

And 4. The true reason of the remedy? and then the office of all the judges is always to make such (d) construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the act, *pro bono publico*. And it was said, that in this case the common law was, that religious and ecclesiastical persons

sons might have made leases for as many years as they pleased, the mischief was, that when they perceived their houses would be dissolved, they made long and unreasonable leases: now the stat. of 31 H. 8. doth provide the remedy, and principally for such religious and ecclesiastical houses which should be dissolved after the act (as the said college in our case was) that all leases of any land, whereof any estate or interest for life or years was then in being, should be void; and their reason was, that it was not necessary for them to make a new lease so long as a former had continuance; and therefore the intent of the act was to avoid doubling of estates, and to have but one single estate in being at a time: for doubling of estates implies in itself deceit, and private respect, to prevent the intention of the parliament. And if the copyhold estate for two lives, and the lease for eighty years shall stand together, here will be doubling of estates *simul & semel*, which will be against the true meaning of parliament.

And in this case it was debated at large, in what cases the general words of acts of parliament shall extend to copyhold or customary estates, and in what not; and therefore this rule was taken and agreed by the whole court, that when an act of parliament doth (a) alter the service, tenure, interest of the land, or other thing in prejudice of the lord, or of the custom of the manor, or in prejudice of the tenant, there the general words of such act of parliament shall not extend to copyholds: but when an act of parliament is generally made for the (b) good of the weal public, and no prejudice can accrue by reason of alteration of any interest, service, tenure or custom of the manor, there many times copyhold and customary estates are within the general purview of such acts. And upon these grounds the Chief Baron put many cases, where he held, that the statute of (c) West. 2. *de donis conditionalibus* did not extend to copyholds; for if the statute alters the estate of the land, it will be also an alteration of the tenure, which would be prejudicial to the lord: for of necessity the donee in tail of land ought to (d) hold of his donor, and do him such services (without special reservation) as his donor doth to his lord.

2. Littleton saith, lib. 1. cap. 9. That although some tenants by copy of court-roll have an estate of inheritance, yet they have it but at the (e) will of the lord, according to the course of the common law. For it is said, that if the lord put them out, they have no other remedy but to sue to their lord by petition, and so the intent of the statute *de donis conditionalibus* was not to extend (in prejudice of lords) to such base estates, which as the law was then taken, was but at

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Co. Lit. 44. a.
31 H. 8. c. 13.
3 Bulst. 152.
Moor 60.
1 Leon. 333.

(a) Cro. Car. 41,
43, 44. Moor
128. Godb. 369.
O. Benl. 163.
3 Bulst. 152.
Hard. 433.
Cawly 106.
(b) Moor 128.
Cro. Car. 42,
43. O. Benl. 163.
1 Rol. Rep. 48.
(c) See 1 Wilton
27. 2 Wilton
400. Moor 188.
189. Sav. 67.
Cro. Eliz. 391.
307. 149. 1 Le-
on. 175. Poph.
34. 123. 2 Sand.
422. Hard. 433.
1 Rol. 838. Lit.
sect. 76. 9 Co.
105. a. Co. Lit.
60. a. b. 4 Co.
22. a.
(d) Cr. Car. 43,
44.
(e) Lit. sect. 77.
2 Co. 17. a.
6 Co. 37. b. Co.
Lit. 60. b. Cro.
Car. 45. 4 Co.
21. a. Hetl. 6.
9 Co. 105. a.

the Will of the lord. And the statute saith, *Quod voluntas donatoris in carta doni sui manifeste express. de cetero observetur*: so that which shall be entailed, ought to be such an hereditament, which is given, or at least might be given by deed or charter in tail.

3. Forasmuch as great part of the land within the realm, is in grant by copy, it will be a thing inconvenient, and occasion great suit and contention, that copyholds should be (a) entailed, and yet neither fine nor common (b) recovery bar them; so as he who hath such estate cannot (without the assent of the lord by committing a forfeiture, and taking a new estate) of himself dispose of it, either for payment of his debts, or advancement of his wife, or his younger children; wherefore he conceived that the statute *de donis conditionalibus* did not extend to copyholds, *quod fuit concessum per totam curiam*. But it was said that the statute without special custom, doth not extend to copyholds; but if the (c) custom of the manor doth warrant such estates, and a remainder hath been limited over and enjoyed, or plaints in the nature of a *formedon* in the descender brought in the court of the manor, and land so entailed by copy recovered thereby, then the custom co-operating with the statute makes it an estate-tail; so that neither the statute without the custom, nor the custom without the stat. can create an estate-tail.

And to this purpose is (d) Littleton, lib. 1. cap. 8. for he saith, that if a man seised of a manor, within which manor there hath been a custom which hath been used time out of memory, that certain tenants within the same manor have used to have lands and tenements, to hold to them and their heirs in fee-simple, or fee-tail, or for term of life, &c. at the will of the lord, according to the custom of the same manor; and a little after, that *formedon* in descender lies of such tenements, which writ, as it was said, was not at the common law.

To which it was answered by the Chief Baron, that if the statute (without custom) shall not extend to copyholds, without question the custom of the manor cannot make it extend to them: for before the statute, all estates of (e) inheritance, as Littleton saith, lib. 1. cap. 2. were fee-simple, and after the statute, no custom can begin, because the statute being made in 13 E. 1. is made within time of memory; *ergo*, the estate-tail cannot be created by custom; and therefore Littleton is to be intended (inasmuch as he grounds his opinion upon the custom, that copyholds may be granted in fee-simple, or fee-tail) of a fee-simple conditional at the common law: for Littleton well knew, that no custom could

(a) Moor 189.
Sav. 67. Cro. El.
149, 307. 391.
1 Leon. 175.
Poph. 34. 128.
2 Sand. 422.
Hard. 433. a.
9 Co. 105 a.
1 Rol. 838. Co.
Lit. 60. a. b.
1 Rol. Rep. 48.
4 Co. 22. a.
Moor 188.
(b) Cro. Car.
43. 45. Godb.
368. O. Benl.
165. Poph. 35.
Cro. Eliz. 391.
Cart. 238. Cro.
Car. 45.
(c) 1 Rol. 838.
Co. Lit. 60. b.
(d) Lit. sect. 77.
Co. Lit. 60. b.
Rep. Q. A. 98.
160.
Skin. 269, 297.

(e) Co. Lit. 19. a.
Cro. Car. 45.
Poph. 34. 1 Co.
103. b. 6 Co.
40. a.
(f) Co. Lit. 45.
114. b. 115. a.

could commence after the stat. of West. 2. as appears in his own book, lib. 2. c. 10. and 34 H. 6. 36. And where he saith, that *formedon* in (a) descender lies, he also saith, that it lies at the common law. And it appears in our books, that in special cases a *formedon* in the descender lay at the common law, before the stat. of Westm. 2. which see 4 E. 2. *formedon* 50. (b) 10 E. 2. *formedon* 55. 21 E. 3. 47. Plowd. Com. 246. b. &c.

(a) Co. Lit. 60. b.
280. b. 19. a.
Lit. sect. 481.
F. M. B. 217. D.
Poph. 34.
(b) O. Benl. 165.
1 Rol. Rep. 4.
Co. Lit. 60. b.

And where it was further objected, that the statute of West. 2. cannot without custom make an estate tail of copyholds, because without custom, such estate cannot be granted by copy, for it was said, if estates had been always granted to one and his heirs by copy, that a grant to one and the heirs of his body, is another estate not warranted by the custom: so that in such manors, where such estates of inheritance have been allowed by custom, the statute doth extend to them, and makes them, which before were fee conditional, now by the statute estates in tail, and that the statute cannot, as hath been agreed before, alter the custom, or create a new estate not warranted by the custom.

To that it was answered by the Chief Baron, that where the custom of the manor is to grant lands by copy *in feodo simplici* (as the usual pleading is) without question, by the same custom lands may be (c) granted to one and the heirs of his body, or upon any other limitation or condition; for these are estates in fee-simple, & *eo potius*, that they are not so large and ample as the general and absolute fee-simple is, and therefore the generality of the custom doth include them, but not *e converso*, *ad quod non fuit responsum*. But it was agreed by the whole court, that another act made at the same parliament, cap. 18. which gave the *elegit* (d) doth not extend to copyholds, for that would be prejudicial to the lord, and against the custom of the manor, that a stranger should have interest in the land held of him by copy, where by the custom it cannot be transferred to any without a surrender made to him, and by the lord allowed and admitted. But it was agreed by them, that other statutes made at the same parliament which are beneficial for the copyholder, and not prejudicial to the lord, may be, by a favourable interp. extended to copyholds, as cap. 3. which gives the wife a *cui* (e) *in vita*, and receipt, and cap. 4. which gives the particular tenant a *quod ei de forceat*; and therewith agrees 10 E. 4. 2. b.

(c) Godb. 20.
Poph. 35.
1 Leon. 36.
Cro. Eliz. 323.
373. 4 Leon. 64.
1 Rol. 511.
4 Co. 23. a. Co.
Lit. 52. b.

(d) 1 Rol. 883.
Cro. Car. 44.
Hard. 433.
O. Benl. 163.
Sav. 67.

(e) Cro. Car. 43.
2 Inst. 343. Sav.
67. 4 Co. 23. a.

And in this case it was also resolved, that altho' it was not found (g) that the said rents were the usual rents, accustomed to be reserved within twenty years before the parliament, yet inasmuch as they have found, that the accustomed rent was reserved, and a custom goes at all times before, for this cause it shall be intended, that it was the accustomed rent within the twenty years, and so it should be intended, if the contrary be not shewed of the other side. And judgment was entered for the Queen.

(g) 4 Co. 65. b.
Hob. 55. 262.
1 Leon. 333.
2 Rol. 700.
9 Co. 74. a.
Cr. Jac. 413.
Post. 42. b.

DOWTIE's Case.

Trin. 26 Eliz

Adjudged in the Exchequer.

(a) 1 Leon. 21.
 3 Leon. 187.
 Hob. 171. 9 Co.
 95. b. 96. a. 7
 Co. 20. a.

(a) **I**N an information upon an intrusion in the Exchequer against John Dowtie, who intruded into five messuages or cottages in the parish of St. Sepulchre in London; upon not guilty pleaded, the jurors gave a special verdict to this effect; that John late Viscount Lisle (who was afterwards Duke of Northumberland) was seised of the said messuages in fee, and being so seised, by his deed indented and inrolled within six months, &c. in consideration of money did bargain and sell to the Lady Johan Lea all his tenements and cottages situate in the parish of St. Andrew in Holborn, in the occupation and tenure of William Gardiner; to have and to hold to the said Lady Johan for her life, the remainder to Katharine her daughter, and to her heirs: and further found, that by force of the said bargain and sale, the said Lady Johan did enter into the said five messuages or cottages, and was thereof seised, *prout lex postulat*, and took to husband Sir Thomas Chaloner: and afterwards the said Sir Tho. and dame Johan 18 *Aprilis*, 5 E. 6. demised the said five messuages to one Paken for 21 years, by force of which the said Paken entered, and took the profits. And afterwards, *scil.* the first year of Queen Mary, the said Duke was attainted of high treason, &c. and afterwards Queen Mary died; and afterwards, *scil.* 20 *Julii*, 18 Eliz. the Queen, by her letters patent under the great seal, granted the said five messuages to John Farneham and his heirs, with a proviso in the same letters patent, that if the said tenements, rents, and

and profits were (not) from the Queen that now is, or from her sister Queen Mary, or her brother E. 6. or father H. 8. concealed, subtracted, or unjustly detained, and so remained till the first inquisition or certificate, that then the letters patent shall be void; and the defendant claimed *in* under the said letters patent: and further found, that the said five messuages or cottages lay in the parish of St. Sepulchre; and that at the time of the said bargain and sale they were in the occupation of the said William Gardiner. And if upon the whole matter the Queen granted by the said letters patent the tenements aforesaid to the said Farneham, then they found the defendant not guilty; and if the Queen did not grant the said five messuages or cottages by the said letters patent, then they found the defendant guilty. And upon many arguments at the bar and bench, judgment was given for the Queen by Sir Roger Manwood Chief Baron, and the whole Court of Exchequer. And in this case three points were unanimously resolved.

First, that nothing passed by the said bargain and sale, for notwithstanding the later (a) certainty, *scil.* in the tenure of William Gardiner, was true; yet because the first certainty, *scil.* in the parish of St. Andrew in Holborn, was false, for this cause the bargain and sale was utterly void. But otherwise had it been, (b) if a true certainty had been in the first place; as if he had bargained and sold, (the tenements, &c. in the tenure of William Gardiner in the parish of St. Andrew, Holborn,) there it was agreed that the tenements shall pass well enough notwithstanding the addition of the falsity, for (c) *utile per inutile non vitiatur*: but in the case at bar, it was agreed, that the bargain and sale was void, and that the said Lady Lea was a disseisorefs: but the great doubt of the case was, when the disseisee is attainted of high treason, if the land itself should be presently in the actual possession of the King by force of the statute of (d) 33 H. 8. c. 20. or if the King until seisure, &c. should have only a mere right: and the doubt arose upon the purview and words of the act; for by the same act, all rights, &c. are given to the King. And further it is enacted, that the King shall be in actual possession without any office found thereof, &c. saving to all strangers all such rights, &c. possession, &c. as if the act had not been made: and it was declared, that there were three causes for making the said branch of the act of (e) 33 H. 8. First, that by the common law for lands in fee-simple, and by the statute of 26 H. 8. c. 13. for lands in tail, the actual possession was not in the K. by attainder before office, for the words of the act are, "That every offender shall lose and forfeit to the King all such lands, &c." by which words the lands shall not be in the actual possession of the King until office; and with that

B 2

agrees

(a) 3 Leon. 21.
Hob. 171. Cro.
Jac. 22, 473.
3 Keb. 413, 414.
2 Co. 33. a. b. 33.
a. b. 4 Co. 35. a.
b. 50. a. Plowd.
191. b.
(b) 1 Leon. 21.
3 Leon. 235.
Hob. 171. Con.
Moor 881. Cr.
Eliz. 39. 299.
Cart. 154.
(c) Co. Lit. 3. a.
227. a. 2 Syd. 63.
70. 2 Roll. Rep.
422. Cart. 154.
155. 2 Sand.
369. Hob. 171.
(d) 3 Inst. 19.
(e) 1 Leon. 21.
3 Leon. 187.
4 Leon. 169, 172.
2 Rol. Rep. 318,
321, 324; 375.
421. 503. 3 Inst.
19. Godb. 301,
304, 305. 312,
315. Stamf. Cor.
598. a. Stamf.
Prae. 53. a. b.
1 Co. 42. a. 48. a.
3 Co. 2. b. 5 Co.
52. b. 7 Co. 12.
b. 15. b. 422. b.
Kelw. 17. b. Co.
Lit. 372. b. 392.
b. Poph. 19.
Dyer 45. pl. 56.
344. a. 1 Anderf.
293. Palm. 439.
1 Jones 70, 71,
75, 76, 77, 80.
Cro. Car. 428,
461. Moor 307,
311, 312, 320,
323, 327, 329.
Hob. 231, 335,
341, 344, 345.

(a) Dyer 325. pl. 38. 1 Co. 42. a. 2 Rol. Rep. 497. Cro. Car. 173. 2 Ander. 34. (b) 2 Rol. Rep. 321. Cro. Car. 173. Godb. 312. Br. N. C. 103. 4 Co. 58. a. 1 Jones 71. (c) 3 Leon. 187. 9 Co. 95. b. 96. a. 9 H. 7. 2. b. Br. Office antea Escheater 34. Br. Pre. 91. Br. Escheat 25, 33. Plowd. 229. b. Moor 293. Nichol's Case. See Cases in Law, &c. 361. Et Post. 61. b. (d) 2 Rol. Rep. 325, 340, 375. 421. 1 Jones 71. Lucas 361. (e) Godb. 305, 316. 2 Rol. Rep. 321, 325, 418, 428, 496, 504, 108. 2 Anderf. 34. 8 Co. 166. a. Hob. 343. Cr. El. 28. 1 Jones 81. 1 Syd. 199. (f) 26 H. 8. c. 13. 1 Leon. 21. Le S. Lumley's Case. 1 Rol. Rep. 162. 2 Rol. Rep. 314, 315, 318, 319, 320, 321, 323, 324, 325, 340, 374, 416, 418, 420, 501, 503, 507, 508. 1 Jones 70, 71, 75, 76, 77, 80. Cro. Car. 428. 1 Co. 22. a. 7 Co. 33. a. 34. b. 9 Co. 140. a. 12 Co. 6. 3 Inst. 19. 4 Inst. 42. 2 Ander. 34. Palm. 439. Hetl. 151, 157. Godb. 300, 303, 307, 308, 309, 311, 315, 321, 322, 323, 324. Co. Lit. 372. b. 392. b. Plowd. 552. b. Hob. 334, 339, 340, 341, 343, 344, 345, 347, 348. Dyer 332. pl. 27. 343. pl. 56. Co. Ent. 422. a. (g) Hob. 341. 3 Inst. 19.

agrees the judgment in Plow. Comm. 486. 15 Eliz. (a) Dyer 325. Sir Will. Say's case, 28 H. 8. Br. (b) Office 17. 4 E. 4. 22. 29 H. 8. Br. Charter de Pardon 52. But when tenant in fee simple is attainted of high treason, and dies, there the fee and freehold, without any office found, is cast upon the King for necessity, that the freehold shall not be in suspense, and therewith agrees (c) 9 H. 7. 1. And it was also agreed in the same case, that although the land, which such person so attainted had in fee-simple, be not held of the King, but of a subject, yet presently, by the death of the person attainted, and without any office, the fee and freehold shall be presently vested in the King, and shall not escheat to the lord of whom the land is held, till office found (as *chiter* it is said in Nichol's Case) for the escheat of all lands for high treason belongs to the King only, and to no other, as well of lands held of others as of himself, as it is declared and adjudged in parliament anno 25 E. 3 cap. 2. so that the land can neither escheat to the lord, (for an escheat in such case is not by the law given to him,) nor descend to the heir, because the blood is corrupted; and in abeyance it cannot be; *ergo* it shall vest in the King: but it was agreed, if tenant in tail be attainted of high treason, and dies, the land shall not vest in the King before office, but it shall descend to the (d) issue in tail till office found, for the act of 26 H. 8 gives the forfeiture of it: but neither the act nor the attainder makes any corruption of blood as to the descent of land in tail: for Popham, Attorney-general, said, that so it was agreed in the case of the L. (e) Lumley, that where there was grandfather, father, and son, and the grandfather was tenant in tail, and the father was attainted of high treason, and died in the life of the grandfather, and afterwards the grandfather died, that the land should descend to the son notwithstanding the attainder of the father; which case was affirmed for good law by the whole court; for the father had not the land, neither in possession nor in use, in which two cases the act of 26 H. 8. gave the forfeiture only, and his attainder is not any corruption of blood for the land in tail, but now the statute of 33 H. 8. in all the said cases doth transfer and vest the actual possession in the King presently by the attainder, as well in the life, as after the death of the person attainted, and as well of lands in tail as of land in fee-simple, which was one of the causes of making the said act. Another cause was, that the act of (f) 26 H. 8. extended only to the lands, &c. which the person attainted had in possession or use, and did not extend to (g) rights, conditions, &c. And lastly, the act of 26 H. 8. extended only to attainders of treason by confession, verdict or process

process of utlagary, and therefore attainders by parliament, or when the party stood mute, (in which case such judgment shall be given as if he had confessed the treason, or that he had been found guilty by verdict, &c.) were out of that act. But the act of 33 H. 8. extends to all manner of attainders of treason.

Secondly, it was resolved, that although it be provided by the statute of 33 H. 8. that the King should be in actual possession without any office (a) found thereof, &c. yet when the disseisee is attainted of high treason, presently by his attainder, the King had only a right, for the said words shall have such construction, *scil.* that the King shall be in actual possession without office, *id est*, as if an office had been found thereof. And at common law, if the disseisee had been attainted of treason, and the seisin and disseisin had been found by office, the possession should not be in the King till a (b) *Scire facias* sued, &c. or a seizure at the least; because, when a stranger is seized at the time of the office found, the King shall not be in possession till seizure; and therewith agrees *Stamf. Prærog.* 54. (c) 17 E. 3. 10. 29 Aff. 30. 21 E. 4. 1. Also all possessions, &c. are (d) saved by the said act, as if the said act had not been made; and therefore the possession of the disseisor is saved thereby in the same manner as if a special office had been found by the common law.

Thirdly, it was resolved, that the Queen having but a (e) right, that it should not pass by the grant of the said five mesuages, as in the like case it was adjudged in the Marquis of Winchester's case in the King's Bench. And Popham the Attorney-general, Coke, and others, were of counsel with the Queen. And Robert Atkinson, Henry Beaumont, and others, with the defendant. And afterwards (f) a special office was found, setting forth the seisin and disseisin aforesaid; and thereupon a *Scire facias* was brought against him who was found tenant; and thereupon judgment was given, and the tenements seized into the Queen's hands: and afterwards the Queen, by new letters patent, granted the said tenements to one Saxie and his heirs, who had purchased the estate of the said Katharine, and had newly built the said tenements, and was expelled by the said Downtie, by colour of the said letters patent made to Farneham. And after this judgment and the said letters patents, Saxie peaceably enjoyed the tenements.

[See 3 Black. Comm. 258, 259.]

(a) 1 Leon. 21.
4 Co. 58. a. 9 Co.
59. b. 2 Rol. Rep.
420. Cro. Car.
429.

(b) 9 Co. 95. b.
96 a. 1 Leon. 21.
2 Rol. Rep. 497.
Hob. 243, 244.

(c) 9 Co. 96. a.
(d) Godb. 324.
Skinner 614.

(e) 1 Leon. 21.
2 Rol. Rep. 324.
330. Cro. Car.
428. 429. Antea
4. b. Hob. 243.

(f) 2 Rol. Rep.
497.

Sir WILL. HARBERT's Case.

Mich. 26 and 27 Eliz.

In the Exchequer.

Popham 154.
Moor 169.

MATTHEW HARBERT, 4 E 6. acknowledged a recognizance of 3000 l. to the King in the Court of Augmentation; and after his death a *Scire facias* issued 18 Eliz. out of the Court of Exchequer against the executors *testamenti & ultimæ voluntatis præd' Matthæi & hæred' terrarum & tenementorum quæ sua fuerunt, &c.* And upon that the Sheriff returned, that the said Matthew Harbert had no executors within his bailliwick; and further *quod scire fecit Will. Harbert militi, filio & hæredi dicti Matthæi Harbert per I. D. & D. R. quod sit ceram baronibus, &c.* And at the day of return, the said Sir William Harbert made default, upon which the Barons gave judgment, *Quod dicta domina regina recuperet versus dict' Will. Harbert dicta tria millia lib. & quod ipse idem Willielmus de eisdem 3000 l. erga dictam dominam reginam nunc oneretur, & ei inde satisfaciat.* And thereupon the said Sir William Harbert brought a writ of error, and assigned three errors: 1. In the *Scire facias*. 2. In the return. The 3d in the judgment. And this term the errors were moved by Plowden, being of counsel with Sir William Harbert, before Sir Tho. Bromley Lord Chancellor of England, and the Baron of Burleigh Lord Treasurer of England, and the two Chief Justices, Wray and Anderson, in the Exchequer Chamber. And in this case divers points were resolved.

(a) Cro. Jac.
450.
2 Inst. 394.
2 Bulst. 63, 99.
2 Roï. Rep. 295.
Co. Lit. 290. b.
Cart. 20. 5 Co.
38. a.
(b) 2 Inst. 394.
2 Bulst. 63, 99.

First, that, (a) at the common law, where a common person sues a recognizance or a judgment for debt or damages, he shall not have the body of the defendant, nor his lands (unless in special case) in execution: but at the (b) common law he shall have execution in such case only of his goods and chattels, and of corn, and the like present profit which shall grow upon the land, to which purpose the com. law gave him two several writs:

1. A

I. A (a) *Levari facias*, by which writ the Sheriff was commanded, *quod de terris & catallis ipsius A. &c. Levari faciat, &c.* and another writ called *Fieri facias*, which was only *de bonis & catallis*, both which writs ought to be sued (b) within the year after the judgment, or the recognizance acknowledged; and if he had not the one or the other within the year, the plaintiff or the conusee was put (c) to his action of debt. And now by the stat. of West. 2. cap. 45. a (d) *Scire facias* is given; and by the stat. of West. 2. cap. (e) 18. *cum debitum fuerit recuperatum, &c.* the *elegit* is given of the moiety of the land, which was the first act which subjected land to the execution of a judgment, or of a recognizance, which is in the nature of a judgment; and therewith agreeth F. N. B. 265. g. And by the stat. of (f) 13 E. 1. *de mercatoribus*. (g) 27 E. 3. cap. 9 & (h) 23 H. 8. cap. 6 it is provided, that in case of a statute merchant, or statute staple, all the lands, which the conusor had at the day of the conufance, shall be extended, in whose hands soever they after come, either by feoffment or other manner. But in debt against the heir upon an obligation made by his ancestor, the plaintiff by the (i) common law should have all the land which descended to him in execution against him; and yet he should not have execution of any part of the land against the father himself; but the reason thereof was, because the common law gave an action of debt against the heir; and in such case, if he should not have execution of the land against the heir, he could have no fruit of his action; for the goods and chattles of the debtor do belong to his executors or administrators; and so for necessity in such case only land was liable to execution of the debt of a common person at the common law: also the body of the defendant was not liable to execution for debt at the common law; *vide* 13 H. 4. 1. But the common law, which is the preserver of the common peace of the land, did abhor all force as a capital enemy to it; and therefore, against those who committed any force, the common law did subject their bodies to imprisonment, which is the highest execution, by which he loses his liberty till he agree with the party, and pay a fine to the King; and therefore it is a rule in law, that in all actions *quare vi & armis*, *Capias* lies, and where *Capias* lies in process, there, after judgment, (k) *Capias ad satisfaciendum* lies, and there the K. shall have *Capias pro fine*; with that agreeth 8 H. 6. 9 35 H. 6. 6. 22 E. 4. 22. 40 E. 3. 25. 49 E. 3. 2. and many other books. Then by the statutes of (l) Marlebridge, cap. 23. and (m) West. 2. cap. 11. *Capias* was given in account, for at the common law process in account was distress infinite; and afterwards by the statute of (n) 25 E. 3. cap. 17. the like process was given in debt as in account; for before that statute the body of the defendant was not liable to execution

- (a) F. N. B. 265, 266. Co. Lit. 291. a.
 2 Bulstr. 63.
 Rep. Q. A.
 (b) Co. Lit. 291. a.
 2 Bulstr. 63.
 (c) 5 Co. 88. a. Cart. 124.
 F. N. B. 265. g.
 21 E. 3. 22, 23.
 (d) Co. Lit. 291. a.
 2 Bulstr. 63.
 F. N. B. 265. g.
 2 Inst. 469. 471.
 (e) 2 Roll. Rep. 295. 2 Inst. 394.
 395. 2 Bulstr. 63.
 F. N. B. 265. g.
 Cro. Jac. 450.
 7 Co. 38. a.
 Co. Lit. 289. b.
 (f) 7 Co. 38. a.
 (g) 7 Co. 37. b.
 (h) 7 Co. 37. b.
 (i) Plowd. 441. a.
 Cro. Jac. 450.
 Wing. Max. 556.
 6 Co. 47.
 Dyer 81. contr.
 Hob. 61. 17 E. 3. 58. pl. 44.
 17 E. 3. 73. pl. 105.
 (k) Co. Lit. 290. b.
 (l) F. N. B. 117. b. 2 Bulstr. 63.
 Co. Lit. 89. a.
 2 Inst. 143.
 (m) Co. Lit. 89. a.
 2 Inst. 380.
 2 Bulstr. 63.
 (n) 2 Roll. Rep. 295. 2 Bulstr. 5 Co. 88. a.

(a) Cro. Jac.
450. 513. Palm.
167. Plowd.
440. a.
(b) Co. Lit. 90. b.
106. a. 131. b.
Godb. 293.
2 Rol. Rep. 295.
Lit. Rep. 100.
(c) Plowd.
321. a.
Godb. 292, 297.
2 Rol. Rep. 300.
302. Hard. 23,
25, 26. 8 Co.
171. a. 11 Co.
93. a.
(d) Plowd. 440.
7 Co. 21. b. 29. b.
(e) 2 Rol. Rep.
296, 297, 303,
304. 11 Co.
92. b. 12 Co. 3.
2 Inst. 19.
Lane 48, 108.
Godb. 293, 299.
1 Vent. 132.
Dyer 160. pl. 41,
225. pl. 32, 33,
295. pl. 10.
(f) 7 Co. 19. a.
b. 21. a. b.
Lane 51.
Hard. 27, 304,
368, 442. 4 Inst.
118, 119.
O. Ben. 65, 66.
67.
(g) Moor 169.
Plowd. 72. b.
Cro. Car. 295.
2 Bulstr. 15.
(h) 2 Inst. 396.
(i) Heil. 127.
(k) Moor 169.
(l) Cro. Car. 296.
(m) 3 Bulstr. 317,
320, 321. Poph.
154. 1 Cro. 313.
(n) 3 Bulstr. 320.
3 Bulstr. 306,
318. 30 E. 3.
23 b.
F.N.B. 162. b. c.

for debt, for the reason and cause aforesaid; but it was resolved that (a) at the common law, the body, the land, and the goods of the accountant, or the King's debtor, were liable to the King's execution, for (b) *Theſaurus Regis eſt pacis vinculum, & bellorum nervi*. And therefore the law gave the King full remedy for it: and therewith agrees 5 Eliz. Dyer (c) 224. and Plow. Com. (d) 321. Sir Will. Cavendiſh's caſe, who was Treafurer of the Chamber, 24 E. 3. (e) Walter de Chirton's caſe, and infinite precedents in the Exchequer, to prove, that for the King's debt, the body and the land of the debtor ſhall be liable by the common law before the ſtatute of (f) 33 H. 8. cap. 39.

Secondly, (g) it was reſolved, that in caſe of a common perſon, the heir of the conuſor, or he, againſt whom the judgment is given in debt, ſhall be only charged, and ſhall not have contribution againſt the terre-tenant in ſome caſes, and in ſome caſes he ſhall have contribution, and ſhall not be only charged. For if a man be ſeiſed of three acres of land, and acknowledges a recognizance or a ſtatute, &c. and enfeoffs A. of one acre, B. of another, and the third deſcends to his heir; in this caſe, if execution be ſued (b) only againſt the heir, he ſhall not have contribution, for he comes to the land without conſideration, and the heir ſits in the (i) ſeat of his anceſtor. *Et hæres eſt alter ipſe, & filius eſt pars patris*, and as it is ſaid, *mortuus eſt pater, & quaſi non eſt mortuus, quia reliquit ſimilem ſibi*; and therefore the heir ſhall not have contribution againſt any purchaſor, altho' *in rei veritate* the purchaſor came to the land without any valuable conſideration, for the conſideration of the purchaſe is not material in ſuch caſe. And ſo it was of late reſolved in the caſe of Thomas (k) Gawdie late Maſter of the King's Bench, that the heir may be ſolely charged, and ſhall not have contribution againſt purchaſors. For although in caſe of recognizance, ſtatute, or judgment, the heir is charged as terre-tenant, and not as heir, as appears by 27 H. 6. Execution (l) 135. (m) 15 E. 3. (n) Age 95. and the reaſon is, becauſe by recognizance or ſtatute the heir is not bound, but the conuſor *concedit quod dicitur pecuniæ ſumma de terris, &c. levetur*; yet he ſhall not have contribution againſt a purchaſor, againſt the opinion of Finchden 48 E. 3. 5. b. But yet in ſome caſes the heir ſhall have contribution, and ſhall not be only charged, and therefore if a man be ſeiſed of two acres, one of the nature of Borough Engliſh, and binds himſelf in a ſtatute or recognizance: or if judgment in debt be given againſt him, and he dies, having iſſue two daughters, who make partition; in this caſe, if one only be charged, ſhe ſhall have contribution; for as one purchaſor ſhall have contribution againſt another, and againſt the heir of the conuſee alſo, ſo one heir ſhall have con-

contribution against another heir, for they are *in æquali jure*, Trin. (a) 24 E. 3. 28 a. in a *Scire facias* to have execution of damages recovered in a writ of intrusion of a ward, the Sheriff returned, that the defendant, against whom the judgment was given, is dead; whereupon a writ issued to warn the tenants of the land, who were tenants to the defendant at the time of the judgment, who were returned warned; one of the tenants said, that his cousin (who was another than him, against whom the judgment was had) died seised, whose heir he is, and is (b) within age, and prayed his age, and that the parol might demur against all the other terre-tenants till he was of age. *Unde colligo*, that if there be grandfather, father, and two daughters, and judgment is given for debt or damages against the grandfather, and he dies, and the father dies, one of the daughters within age, and the other of full age, partition is made, the elder sister shall not be charged alone, but shall take advantage of the infancy of her sister, for both heirs are in the same degree. The same law if a man be bound in a (c) recognizance, and hath issue two daughters, and dies, they make partition; one alone shall not be charged, but shall have contribution; and if one be within age, the other shall take benefit thereof; for, in such case, although she be charged as terre tenant, yet she shall have her age (d) See for this 11 E. 3. Age 4. 15 E. 3. Age 95. 29 Aff. 37. 29 E. 3. 50. 47 Aff. 4. in Sir Rich. Walgrave's (e) case. So if a man be bound in a stat. or recognizance, and after his death some of his land descends to the heir on the part of the father, and some to the heir on the part of the mother; in this case one alone shall not be charged; and if he be, he shall have contribution against the other. So, and with this agrees 11 H. 7. 22. Br. (f) in dower, if the tenant vouch the heir in three several wards, every one shall be equally charged, as it is agreed in 48 E. 3. 5. a. b. But it was resolved in the case at bar, that although the heir in this case was charged as terre-tenant, yet for the causes afores. the writ which issued against him only, and not against the other tenants, was good enough by the rule of the court. Note, reader, if two, four, (g) or more men, be severally seised of land, and they all join in a recognizance, in this case the conusee cannot extend the land of any of the conusors only, but all ought equally to be charged; for although the land of the conusor himself may be only charged, when divers men have purchased any of the land subject to the recognizance, because the purchaser is in other degree (h) than the conusor himself, yet one of the conusors shall not be only charged, for he stands in equal degree with the other conusors, and that appears by 29 Aff. 37. and 29 E. 3. 50. Sir John Langford's case; where the case was, that four

(a) 1 Rol. 147.
Fitz. Age 102.

(b) Cro. Car.
295. 9 E. 3. 30.
pl. 21.
24 E. 3. 55.

(c) Co. Lit.
290. a.
(d) 1 Rol. Rep.
140. Co. Lit.
fo. 290. a.
(e) 2 Co. 25. b.
5 Co. 100. a.
Dy. 239. pl. 39.
Mo. 74. 1 Ander.
10 Co. Lit.
376. b.
Hob. 25. 11 H. 7.
12. b. 11 E. 3.
Det. 7. Br.
Joinder in
Action 119.
(f) 2 Co. 25. b.
Br. Dow. 18.
Postea 14. a.
Fitz. Vouch. 76.
Br. Voucher 38.

(g) 2 Inst. 396.
2 Bulstr. 15.

(h) 1 Rol. 147.
Br. Age 36. Br.
Confession 28.
Br. Charge 27.
Br. Parol Demur
16. Fitz. Age 73.

were

5 E. 3. 74. a. pl.
87.
1 E. 3. 13. pl.
41.

(a) 5 Co. 100. a.
2 Co. 25. b.

(b) 1 Rol. 140.
(c) *Audita que-*
rela 8.

(d) 1 Rol. 306.
2 Rol. Rep. 54.
2 Bulstr. 17.

(e) F. N. B.
240. a.

(f) 1 Rol. 305.
Cro. Jac. 507.
2 Rol. Rep. 54.
2 Bulstr. 17.

(g) 2 Bulstr.
14, 16.

(h) 2 Rol. 87.
Antea 12. a.

were bound in a recognizance of debt acknowledged in the court of Chester to Sir John Langford, and afterwards one of the conufors died, his heir within age; Sir John Langford brought a *Scire facias* against the three survivors to have execution, who pleaded, that the heir of the conufor who was dead, was within age, and in as much as during his minority he cannot be charged, and the survivors only ought not to be charged, they demanded judgment, &c. And because Sir John Langford did not deny it, it was awarded that the parol should demur; upon which Sir John Langford brought a writ of error in the King's Bench, which judgment was there affirmed. Out of which judgment I observe, 1. That amongst the conufors themselves there shall be an (a) equal charge, and the land of any of them shall not be only extended. 2. That the heir of any of them shall not have greater privilege in law than the conufor himself; for it appears by this judgment, that he shall be equally charged with the conufors themselves, which agrees well with the said resolution that he shall not have contrib. against a purchasor. The 3d thing that I observe is, that the heir is not charged only as (b) terre-tenant, but in some respect as heir, for otherwise he should not have his age, as it was adjudged in that case. It is ruled in (c) 17 E. 3. 43. a. that the (d) heir of the conufor shall have *audita querela* before execution sued, as well as the conufor himself, and shall (e) have a *superfedas*; but so shall not a (f) strange purchasor have till he be ousted by execution, and therewith agrees (g) 17 Aff. 24. & 18 E. 3. 25. And with the said judgment in 29 Aff. agrees 19 E. 3. (b) Execut. 81. that if judgment be given against two disseisors in assize for the land and damages, and one disseisor dies, the execution shall not be awarded against the surviving disseisor, who was party to the wrong; but as well the heir as the disseisor shall be equally charged: now for as much as no land was subject to execution for the debt of a common person at common law, but only by the said statute, it is worthy consideration what should be the reason of the said differences concerning contribution, and by what law the purchasor should have greater privilege than the conufor himself, or his heir, and that one heir only should not be charged, but all the heirs together, & sic de cæteris. As to that, it is to be known, that the Judges and sages of the law have always expounded general statutes according to the rule of the common law, which is built on the perfection of reason, and not according to any private and sudden conceit or opinion: and because in as much as the said statutes have subjected the land to execution for his debt, the Judges and sages of the law considered the rule and reason of the law in case of the heir of an obligor; in which case the land was subject to execution for debt by the common law. And it appears to them, that if a man bound

bound himself and his (a) heirs in an obligation, and died seised of land as well on the part of the mother as on the part of the father, in that case the law required equality; and neither the heir on the part of the father, nor the heir on the part of the mother should be only charged; and therewith agrees 11 H. 7, 12. b.

So in the case in 48 E. 3. when the heir is (b) vouched in the ward of three several heirs, every one shall be equally charged *pro rata*. So if two men (c) alien lands with (d) warranty, the lands of one only shall not be rendered in value; neither if one dies, shall the land of the survivor be only rendered in value, but the charge shall be equal on them. For a joint (e) lien, which binds the land, shall not survive, or lie only on the survivor, as in case of a joint warranty, where two for them and their heirs warrant lands to another and his heirs, the survivor shall not be only vouched: and the Sheriff cannot deliver the land of the one or the other at his pleasure; for in (e) executions, which concern the realty, and charge the lands, the Sheriff cannot do execution on the land of one only. And so if two (f) are bound to warranty, and both die, both their heirs ought to be vouched, and they shall be equally charged: but, against this, two objections were made:

1. That because each of them warrants the whole, that both their lands, or the lands of the one or the other may be put in execution: And so it is *obiter* said in (g) 16 H. 7. 13. a. But to that it was answered and resolved, that although each be bound to warrant the whole, yet *non sequitur*, that the recompence in value shall be made by one of them only; for if the heir be vouched in the ward of several persons, one alone shall not be charged, but all equally, as is held in 48 E. 3. and yet the ancestor did warrant the whole. And where two or more are bound in a (b) recognizance or statute now is each of them bound in the whole, yet the land of one only shall not be extended. But it was also objected, that the case of a recognizance or statute was not like the case of warranty: for by the statute or recognizance, the land is presently bound in whose hand soever it shall come; but so it is not in case of a warranty: to which it was answered and resolved, that for as much as by the said book of 16 H. 7. and all other books, it appears, that the survivor and the heir ought to be vouched together, and so of the heirs of both: and Littleton, chapter *Homage Ancestrel*, saith, that the land which the (i) vouchee had at the time of the voucher shall be liable to render in value; from thence it follows that the charge shall be equal; and that is a stronger case than the case of the statute or recognizance, for the warranty extends to render in value lands of inheritance; but if (k) husband and wife and the heirs of the wife be bound to

(a) 3 Bulstr. 318.
2 Co. 25. b.
Co. Lit. 376. b.
386. b. Dy. 239.
pl. 39. Mo. 74.

1 Ander. 10.
Hob. 25. 11 E. 3.
Der. 7. Ant. 13.

a. Br. Joinder
en Action 119.

(b) 2 Co. 25. b.
Br. Dower 98.
Stath. Dow. 18.

Fitzh. Vouch.
76. Br. Vouch.
38.

(c) Mo. 20. d.
17 E. 3. 41. b.

2 Rol. 87. Fitz.
Voucher. 90.

(d) Co. Lit. 386. b.
1 E. 2. 13. pl.

35. 41. b. pl. 26,
27. E. 3. 80.

pl. 7.
19 H. 6. 55. a.

12 H. 7. 3. a.

17 E. 3. 8. b.

2 Brownl. 99.

(e) Cro. Jac. 507.

(f) 8 Co. 52. a

(g) Co. Lit.

386. b.

2 Brownl. 99.

Br. Recov. en
value 63. Br.

(b) 2 Rol. 87.

29 E. 3. 39. a.

29 Aff. 27.

Br. Charge 27.

Br. Joint-tenants

27. Br. Age 36.

Br. Error 191.

Br. Parol demur

16. Fitz. 73.

Fitz Execution

100.

(i) Co. Lit. 102.

a. Lit. sect. 145.

(k) 2 Rol. 87.

war- Cart. 242.

3 Keb. 187.

(a) 1 Co. 102. b.
2 Co. 68. a.
3 Co. 5. a. b.
25. a. 30. b.
8 Co. 71. b. 72.
a. Lit. Sect.
291. Co. Lit.
117. b.
(b) 2 Brownl.
99. Co. Lit.
376. b. 386. b.
2 Rol 87.
3 E. 3. 11. pl.
37. accords. 1 E.
3. 13. b. pl. 41.

warranty, and the wife dies, the lands of the husband may be alone put in execution, because there are no (a) moieties between husband and wife; and thus are divers opinions in our books, some whereof being ill-reported are well reconciled. 17 E. 3. 41. b. 29 E. 3. 46. a. 12 H. 7. 3. b. 16 H. 7. 13 a. 22 E. 3. 1. a. b. 17 E. 3. 8. 30 E. 3. 40. 19 H. 6. 55. a. But in a personal lien it is otherwise.—As if two be bound in an (b) obligation, there the charge shall survive: so it appears by these cases, that when land shall be charged by any lien, the charge ought to be equal, and one alone shall not bear all the burthen and the law in this point is grounded on great equity: but in all the cases at the common law, if the party who should be charged had aliened the land *bona fide* before any action brought, the land in the hands of the purchaser was not subject to any charge or execution; and this was the reason why the Judges and sages of the law in construction of the said statutes, although the lands of purchasers, after the judgment, recognizance or statute, were subject to execution, yet gave greater privilege to them, than to the conusor himself or to his heir.

Also the statute of West. 2. cap. 18. provides, *quod vicecomes liberet ei medietatem terræ suæ*, which ought to be intended of all his land; so the statute of 13 E. 1. enacts, that all the lands of the conusor shall be delivered to the merchants, &c. and that is another reason why the (c) land of one terretenant only shall not be charged with the whole debt, for as much as by the statute all the land is liable. And the reason why the conusor himself, at the will of the conusee, may be only charged, is because he himself is the person who was the debtor, and who was bound; and therefore he is subject to execution, and it is but reasonable that he may be only charged; the same law of his heir for the reasons before rehearsed.

(c) 1 Rol. 311.

(d) Dyer 331,
332, 333. pl. 23,
24.
Plowd. 72.
Yelv. 12.
Moore 571.
Cro. Jac. 506,
507.
2 Inst. 396.
Mo. 524, 536.
F. N. B. 103. b.
Cro. Car. 443.
1 Rol. 311.
1 Jones 90.
O. Bendl. 133.
2 Bulstr. 17.
3 Bulstr. 306.
23 E. 3. Execution 127.

Note, reader, when it is said before and often in our books, that if one purchaser be (d) only extended for the whole debt, that he shall have contribution; it is not thereby intended that the others shall give or allow to him any thing by way of contribution; but it ought to be intended that the party, who is only extended for the whole, may by *audita querela* or *Scire fac*, as the case requires, defeat the execution, and thereby he shall be restored to all the mean profits, and compel the conusee to sue execution of the whole land; so in this manner every one shall be contributory, *hoc est*, the land of every terretenant shall be equally extended: and afterwards the counsel of Sir William Harbert moved three errors in the record.

The first was, that the writ of *Scire facias* was *Scire facias hæred' terrarum & tenementorum, &c.* which was improper and against law; for one is always called heir to his ancestor, and not heir to the land, for ancestor and heir are *relativa*, and it cannot be said that one is *filius*, or *consanguineus* & *hæres manerii de Dale*; but that A. was seised of the manor of Dale in fee, and died seised, after whose death the manor of Dale descended to B. as *consanguineo & hæredi prædicti A.* (and shew how) and not *prædicti manerii*. See 1 Inst. 376. a, b.

The second error was, admitting the writ good, then for as much as the writ requires *quod scire fac' hæred' terrarum & tenementorum, &c.* the return of the Sheriff, *quod scire fecit Willielmo Harbert Militi, fil' & hæred' prædicti Matthæi*, is not good, because he doth not return him heir of any lands or tenements, as the writ requires; for his warrant is not to summon the heir of the said Matthew, but the heir of the lands and tenements of the said Matthew, and every return ought to answer the point of the writ. 29 E. 3. 26. a. 34 H. 6. 49. 40 E. 3. 20.

The third error, admitting the writ and the return good, was, that the judgment itself was erroneous. For the judgment is given generally against Sir Will. Harbert, *quod dicta domina regina recuperet versus præd' Will. Harbert dicta tria millia librarum; et quod ipse idem Willielmus de eisdem tribus millibus librar' erga dictam dominam reginam nunc oneretur, & ei inde satisfaciat.* And it was moved by the defendant's counsel, that the judgment ought to have been special; for by this general judgment his own land will be liable, where by the law, the land only which came to him by his father should be liable; and, as hath been said, he is charged as terre-tenant, for the conusee cannot have an action of debt on the recognizance against the heir, for the recognizance is, *quod tunc vult & concedit quod dicta pecuniæ summa de bonis & catallis, terris & tenementis, &c. levetur*: so that the charge is imposed on his goods and lands; so that debt doth not lie on it against the heir, no more than on a recovery in debt, for there a *Scire facias* lies against the heir, but no action of debt: then although the heir makes a default, yet the judgment ought to have been special; and it was said in this case, if the heir had appeared and pleaded a false plea, yet the judgment ought to have been special; for he is not charged merely as heir, but rather as terre-tenant. And with that agrees 33 E. 3. Execution 162. in (a) debt the plaintiff recovered, and before execution sued, the defendant died, the plaintiff prayed a *Scire fac'* against A. who is tenant of the defendant's lands, and had it, who Plow. 440. a. b. 21 E. 3. 9. b. 2 Rol. 70, 71. Cro. El. 692. Cro. Car. 296. Co. Lit. 102. a. b. Fitzh. 76. b. Moor 522. 5 Co. 60. Dyer 373. pl. 14. Poph. 153, 154. 3 Bulst. 317. 318, 320. Palm. 419. 1 Jones 27, 88. (a) 3 Bulst. 318, 321, 322. Poph. 154. 1 Jones 88.

7 Co. 20. 2.

who came and counter-pleaded the execution, and they were at issue, and afterwards did not follow it; wherefore execution was awarded against him, and the plaintiff prayed execution as well of his own lands, which he had the day he pleaded, as of the debtor's lands in his hands, because he pleaded a false plea. But by the rule of the court, he could have only the lands of the debtor. *Vide* 16 E. 3. 15. But these points were not resolved by the court, but afterwards, on a petition made to the Queen, Sir William compounded with her. Plowden and Coke were of counsel with Sir William Harbert; and note well, the new writ of error, after the entry of the first, was not brought, *quod coram vobis residet*, because the record is not removed out of the keeping of him who had the custody thereof before; but it remained in the same custody after the writ of error purchased, as it was before.

[See 3 Blackst. Com. 279.]

BOR-

BORASTON's Case.

Hil. 29 Eliz, in B. R. Rot. 790.

BE it remembered, that heretofore, that is to say, in the ^{Hertf. ff.} term of St. Michael last past, before the lady the Q. at Westminster, came Richard Hynde by James Tong his attorney, and brought here into the court of the said lady the Queen then there, his certain bill against William Ambrye, in the custody of the Marshal, &c. of a plea of trespass and ejectm. of his farm, and there are pledges of prosecution that is to say John Doe and Richard Roe, which said bill followeth in these words. ff. Hertf. ff. Richard Hynde complaineth of William Ambrye in the custody of the Marshal of the Marshalsey of the lady the Queen, before the lady the Queen herself being, for that, that is to say, that whereas one Thomas Brand and Constance his wife, and William Davies and Margaret his wife, on the 9th day of July in the 28th year of the reign of the said lady Elizabeth now Queen of England at Aldenham in the county aforesaid, demised, granted and to farm let to the afores. Richard Hynde, (among other things,) 10 acres of land, with the appurtenances, called the upper part of a close named Reddings, in Aldenham afores. in the county aforesaid: to have and to hold the afores. 10 acres with the appurtenances, to the afores. Rich. Hynde and this assigns, from the feast of St. John the Baptist then last past, until the end and term of 7 years from thence next ensuing, and fully to be complete and ended: by virtue of which said demise the said Rich. Hynde entered into the afores. 10 acres of land, with the appurtenances, on the afores. 9th day of July in the 28th year aforesaid, and was thereof possessed until the aforesaid William Ambrye afterwards, to wit, on the aforesaid 9th day of July in the 28th year afores. with force and arms, &c. into the aforesaid 10 acres of land, with the appurtenances, entered upon the possession of the said Richard; and him the said Rich.

Rich. from his farm afores. the term thereof not yet ended did eject, expel, and amove, and then held out, and as yet holdeth out the said Rich. from his possession thereof, and other wrongs to him did, against the peace of the said Q. to the damage of the said Rich. of 10l. and thereof he bringeth suit, &c. And now at this day, that is to say, on Monday next after 8 days of St. Hilary in this term, until which day the said Will. had license to imparl, and then to answer to the bill aforesaid, &c. before the lady the Q. at Westminster come as well the afores. Rich. by his attorney afores. as the said Will. by Rich. Bel-field his attorney, and the same William doth defend the force and injury when, &c. And saith, that he is not guilty thereof, and of this he puts himself upon the country; and the said Rich. likewise. Therefore let a jury thereof come before the lady the Q. at Westminster, on Wednesday next after 15 days of Easter, who neither, &c. to recognise, &c. because as well, &c. the same day is given to the parties afores. there &c. Afterwards the process thereof was continued between the parties afores. of the plea aforesaid by a jury put between them being respited before the said lady the Q. at Westm. until Wednesday next after 8 days of St. Mich. then next following: unless the Justices of the said lady the Q. assigned to take assizes in the county afores. shall first come on Friday the 12th day of July at Hertford in the county afores. by form of the stat. &c. for default of jurors, &c. At which Wednesday next after 8 days of St. Mich. before the lady the Q. at Westm. came the afores. R. Hynde by his attorney afores. &c. and the afores. Justices of assizes, before whom, &c. sent here their record before them had, in these words: ff. Afterwards at the day and place within contained, before Tho. Gawdy, Knt. one of the Justices of the lady the Q. assigned to hold pleas, before the lady the Q. herself, and Rob. Clark, one of the Barons of the said lady the Q. of her Exchequer, Justices of the said lady the Q. assigned to take the assizes in the county of Hertford by form of the stat. &c. came as well the within named Richard Hynde by H. Brantwayte his attorney as the within written Will. Ambrye by his attorney within mentioned, and the jurors of the jury whereof within mention is made, some of them, that is to say, Rich. Penifather, Thomas Glascock, Jo. Harmer, and Stephen Nebbes came, and in the said jury are sworn. And because the rest of the jurors of the said jury did not appear, therefore others of the standers-by, chosen by the Sheriff at the request of the said Richard Hynde, and by the command of the Justices aforesaid, are of new put, whose names to the panel within written are filed, according to the form of the statute in such case lately made and provided; and some of the jurors so a-new put, that is to say, Edward Vyall, Thomas Cooker, Thomas Throwe, Edward Asler, John Dormer, William Tiverton, Edward Jordan, and Robert Carpenter came, who to say the truth of

of the matters within contained, (together with the jurors aforefaid first impanelled, and fworn,) chosen, tried, and fworn, fay upon their oath, that long before the trespass and ejectment of farm within supposed to be done, one T. Boraston was seised of and in the within written 10 acres of land with the appurtenances, called the upper part of a close called Reddings, in Aldenham within written, in his demesne as of fee, and held the said 10 acres of lands with the appurtenances of one Robert Stepneigh, Esq. as of his manor of Aldenham in free socage. And further the jurors aforefaid say upon their oath, that the aforefaid Th. Boraston had issue of his body lawfully begotten Humphrey Boraston his elder son, and Henry Boraston his younger son: and the aforefaid Humphrey Boraston had issue of his body lawfully begotten Constance Boraston, now the wife of the within named Thomas Brand, and the within named Margaret wife of the within named William Davies: and that afterwards Humphrey Boraston died, living the said Thomas Boraston, and that the aforefaid Constance and Margaret were and are daughters and co-heirs of the aforefaid Humphrey Boraston. And farther, the jurors aforefaid say upon their oath, that the aforefaid Tho. Boraston being so seised of and in the aforefaid 10 acres of land with the appurtenances as aforefaid, afterwards, that is to say, on the 12th day of the month of August in the year of our Lord 1559, in the first year of the reign of the said lady the now Queen, made his testament and last will in writing, in these English words following: "In the name of
" God, Amen, &c. *Item*, I give unto Thomas Amerie and
" Amphillis his wife, all that my upper part of my close
" called Redding, for the term of eight years next after my
" decease, in recompence of one yearly annuity of 46 s. 8 d.
" due unto the said Thomas Amerie, upon one obligation of
" certain years yet during, and upon further condition that
" the said Thomas Amerie shall bring in the said obligation
" to my executors, to be cancelled, and utterly discharged,
" upon this consideration, before such time as the said Thomas Amerie shall make any entry upon the premises,
" and that the said Thomas Amerie, neither his assigns,
" shall not, during the said eight years, fell none of the
" woods, timber, nor underwoods, in, nor upon the said
" upper part, but shall preserve the woods, hawts, and
" springs, to the behoof of the heir in remainder, and
" after the term of the said eight years, the said upper part to remain to my executors, until such time
" as Hugh Boraston shall accomplish his full age of twenty-one years, and the mean profit to be employed by
C my

Pleadings in BORASTON's Case. Part III.

“ my executors towards the performance of this my last will
 “ and testament. And when the said Hugh cometh unto
 “ 21 years of age, then I will that he shall enjoy the said
 “ upper part to him and his heirs for ever. Provided always,
 “ that if the said Tho. Amerie do refuse to bring in his obli-
 “ gation, or to preserve the woods upon the said upper part,
 “ then my executors to enjoy the premises during the said
 “ term of 8 years, paying the said Amerie his annuity of 46s.
 “ 8 d. during the said term of 8 years ;” as by the testament
 and last will aforesaid (amongst other things) it more fully
 appeareth : and farther the jurors aforesaid say upon their
 oath aforesaid, that the afores. Tho. Boraston being so seised
 of the afores. 10 acres of land with the appurt. afterward, that
 is to say, on the 14th day of the afores. month of August in
 the 1st year of the reign of the said lady the now Q. at Alden-
 ham afores. died seised of such his estate ; and further the
 jurors afores. say upon their oath, that the aforesaid Hugh Bo-
 raston in the said testam. and last will named, was son and
 heir of the said Henry Boraston, and that the said Hugh Bo-
 raston died before he came to the age of 21 years, that is to
 say, about the age of 9 years. And further the jurors afores.
 say upon their oath afores. that the interest of the premises afores.
 in the said testament and last will mentioned and devised, as
 well to the said Thomas Amerie and Amphillis his wife, as to
 the executors of the said testam. before the day of the exhibit-
 ing of the bill within written ended and determined. And
 further the jurors afores. say upon their oath, that Philip Bo-
 raston was and is the brother and next heir of the said Hugh
 Boraston, by virtue whereof the said Philip Boraston, after the
 afores. interest of the premises to the said Tho. Amerie and
 Amphillis his wife, and the executors afores. by the afores.
 testam. and last will given and devised was ended and deter-
 mined, entered into the afores. 10 acres of land with the ap-
 purt. as brother and next heir of the said Hugh, and was seised
 thereof as the law requireth ; and being so seised thereof, the
 said Philip Boraston afterwards and before the time of the ex-
 hibiting of the bill afores. that is to say, on the 20th day of
 June in the 28th year of the reign of the lady the now Queen
 demised, granted, and to farm let to the aforesaid William
 Ambrye now defendant, the tenements aforesaid with the ap-
 purtenances in which, &c. to have and to hold to the said
 Will. Ambrye and his assigns for one whole year from thence
 next following to be fully complete and ended, and so from
 year to year as long as both parties should please, by virtue of
 which said demise, the afores. Will. Ambrye entered into the
 afores. 10 acres of land with the appurt. and was possess. thereof,
 and being so possessed thereof, the aforesaid Tho. Brand and
 Constance

Constance his wife, William Davis and Margaret his wife, as in the right of the said Constance and Margaret, afterwards, that is to say, on the 9th day of July in the 28th year of the reign of the lady the now Q. aforesaid, into the aforesaid 10 acres of land with the appurtenances entered in and upon the possession of the said William Ambrye, and were thereof seised as the law requireth; and being so seised thereof at Aldenham afores. the said Thomas Brand and Constance his wife, William Davis and Margaret his wife, afterwards, that is to say, on the said 9th day of July in the 28th year afores. by their indenture bearing date the same day and year, demised, granted, and to farm let, the aforesaid 10 acres of land with the appurtenances to the afores. Richard Hynde, to have and to hold the afores. 10 acres of land with the appurtenances unto the said Richard Hynde and his assigns, from the feast of Saint John the Baptist then last past, until the end and term of 7 years from thence next ensuing, and fully to be complete and ended; by virtue of which said demise, the said Richard Hynde entered into the afores. 10 acres of land with the appurtenances, on the afores. 9th day of July in the 28th year of the reign of the said lady the now Queen afores. and was possessed thereof until the afores. William Ambrye, afterwards, that is to say, on the afores. 9th day of July in the 28th year afores. with force and arms, &c. re-entered into the afores. 10 acres of land with the appurtenances, upon the possession of the said Rich. Hynde, thereof, by the precept and command of the afores. Philip Boraston, and him the said Richard Hynde from his possession thereof held out, and yet doth hold out: but whether upon the whole matter aforesaid, in form afores. found, the re-entry of the afores. William Ambrye into the afores. 10 acres of land with the appurtenances, be, or in law ought to be adjudged, a good and lawful re-entry, the jurors afores. are utterly ignorant, and thereof pray the advice of the court of the lady the Queen: and if upon the whole matter afores. in form afores. found, it shall seem to the court of the said lady the Queen, that the re-entry of the afores. William Ambrye into the afores. 10 acres of land with the appurtenances, in and upon the possession of the said Rich. Hynde, be not nor in law ought to be adjudged a good and lawful re-entry; then the jurors aforesaid say upon their oath afores. that the afores. Wil. Ambrye is guilty of the trespass and ejectment within specified, in manner and form as the afores. Rich. Hynde within against him complaineth, and then they assess the damages of the said Richard Hynde, by occasion of the trespass and ejectment out of his farm, besides his charges and costs by him about his suit in this behalf expended to 8s. and for his charges and costs to 30s. and 4d. But if upon the whole matter aforesaid, in form afores. found, it shall seem to the court of the lady the Q. that the re-entry of the afores. Will. Ambrye into the afores. 10 acres of land with the appurten. in and upon the possession of the said Richard Hynde be, or in law ought to be adjudged a good and lawful re-entry, then the jurors aforesaid

Pleadings in BORASTON's Case. Part III.

say upon their oath, that the said Will. Ambrye is not guilty of the trespass and ejectment of the farm afores. as he within for himself hath alledged : and because the court of the lady the Q. here of giving their judgment of and upon the premises is not yet advised, day thereof is given to the parties afores. in the state that now it is, before the lady the Queen at Westminster, until Thursday next after eight days of St. Hilary to hear their judgment thereof, because the Court of the lady the Queen here thereof are not yet advised, &c. At which day before the lady the Queen at Westm. come the parties afores. by their attornies afores. and because the court of the lady the Queen here of giving their judgment of and upon the premises is not yet advised, further day thereof is given to the parties afores. in the state it now is, before the lady the Q. at Westminster until Wednesday next after 15 days of Easter, to hear their judgment thereof, &c. because, &c. and so from term to term, until the plaint afores. was further adjourned by another writ of the said lady the Queen of Common Adjournment before the Queen until the morrow of All Souls, at the castle of Hertford in the county of Hertford, at which day before the lady the Queen at the castle of Hertford came the parties afores. by their attornies afores. And because the court of the lady the Queen here of giving their judgment of and upon the premises is not yet advised, day thereof is further given to the parties afores. in the state as it is now before the lady the Queen at the castle of Hertford, until Tuesday next after 8 days of St. Hilary to hear their judgment, &c. because, &c. before which day the plaint afores. was adjourned by a writ of the lady the Queen of Common Adjournment before the said lady the Queen until in 8 days of St. Hilary at Westminster. At which day before the lady the Queen at Westm. come the parties afores. by their attornies afores. and because the court of the lady the Queen here of giving their judgment of and upon the premises is not yet advised, day is further given to the parties afores. in the state as now, before the lady the Queen at Westm. until Wednesday next after 15 days of Easter, to hear their judgment thereof, &c. because &c. At which day before the lady the Queen at Westm. come the parties afores. by their attornies afores. upon which the premises being seen by the court of the lady the Queen here, and diligently looked into, and mature deliberation being thereof had, because it seemeth to the court of the said lady the Queen here, that the entry of the afores. Will. Ambrye above specified into the afores. 10 acres of land with the appurt. in and upon the possession of the afores. Rich. Hynde, was a good and lawful re-entry ; therefore it is considered that the aforesaid Rich. Hynde take nothing by his bill afores. but that he for his false clamour be taken, &c. and that the afores. Will. Ambrye may go thereof without day, &c.

BORASTON's Case.

Of contingent
remainders,
the devi or's
intent, &c.

Hill. 29 Eliz. in B. R. Rot. 790. be-
tween Hind and Ambrye.

BETWEEN Richard Hynde, plaintiff, and William Ambrye, defendant, in an *ejectione firmæ* in the King's Bench, of lands in Aldenham in the county of Hertford, on a lease made by Thomas Brand and Constance his wife, and William Davies and Margaret his wife, to the plaintiff for seven years. The defendant pleaded, Not guilty, and the jury gave a special verdict to this effect: Tho Boraston was seised in fee of the lands afores. and held them in socage, and had issue Humphrey Boraston his elder son, Henry Boraston his younger son; and Humphrey had issue the said Constance, wife of the said Brand, and the said Margaret, wife of the said Davies; and the said Henry Boraston had issue Hugh. And afterwards the said Thomas Boraston, August 12, 1559, by his will in writing, devised the said lands in these words, *viz.* "Item, I give
"to Thomas Amery and Amphillis his wife, all that my
"upper part of my close called Redding, for eight years next
"after my decease. And that the said Thomas Amery, nor
"his assigns, shall, during the said term, sell none of the said
"wood or timber in or upon the said upper part, but shall
"preserve the woods to the use and behalf of the heir in re-
"mainder: and after the term of the said 8 years, the said
"upper part to remain to my executors until such time as Hugh
"Boraston shall accomplish his full age of 21 years, and the mean

2 Bulstr. 123.
124. 2 Rol. Rep.
223, 427. Cro. -
Jac. 510.
Swinb. 135.
See Taylor and
Wharton's
Case. Carter's
Rep. 182.
See Lane's
Rep. 56.

2 Bulstr. 124. 125.
Lit. Rep. 310.

“ profits to be employed by my executors towards the performance of this my last will and testament: and when the said Hugh shall come to his age of twenty-one years, then I will he shall enjoy the said upper part to him and to his heirs for ever. .

And afterwards the said Thomas Boraston, 14 Augusti anno 1 Eliz. died, and the said Hugh died before his full age of twenty-one years, about the age of nine years. And that Philip Boraston was Brother and heir of Hugh Boraston; and the said Philip, after the end and expiration of the said terms, that is to say, of Thomas Amery and Amphillis his wife, and of the said executors, entered into the lands, as brother and heir of the said Hugh Boraston, and demised the said lands to the said William Ambrye, &c. by force whereof he was possessed, upon whom the said lessors of the plaintiff, in right of their said wives, entered into the said lands; and by indenture, bearing date the same day and year mentioned in the declaration, demised to the plaintiff, *prout* in the declaration, by force whereof he was possessed, until the defendant, by the commandment of the said Philip, entered upon him, &c. And whether the said entry of the defendant was lawful or not, was the doubt which was referred to the court. And this case was argued by the counsel of the plaintiff. And it seemed to them, that no remainder was vested in the said Hugh Boraston, until he attained his age of twenty-one years; and in the mean time, that the lands did descend to the daughters of the elder son, who are general heirs to the devisor; and forasmuch as Hugh did never accomplish his said age, for this cause the land never vested in him, but remained in the heirs general; and in proof that the remainder did not vest in Hugh before his said age, they said, it appeared by the words of the will, that he should not have it till his said age of twenty-one years. For the words are, “ and when the said Hugh shall accomplish his said age of twenty-one years; then I will he shall enjoy the said upper part to him and to his heirs for ever:” so that it fully appears, that this devise to Hugh doth depend on a contingent, that is to say, on the accomplishment of Hugh’s full age of twenty-one years, and that ought to precede before the remainder can begin, and whether Hugh shall attain to his age is so incertain, that no man can know, but it depends solely on the providence of God. And it was said, if Thomas Boraston in this case had made a lease till Hugh attain his full age, Hugh then being of the age of nine years, the lessee should not have an absolute lease for twelve years: for if Hugh should die before his full age, the lease would be ended, *quod fuit concessum per totam curiam.*

It

Cro. Jac. 510.

6 Co. 35. b.
Plow. 273. a.

It was also said, that when a (a) particular estate (which doth support a remainder) may determine before the remainder can begin, there the remainder shall not presently vest, but shall depend in (b) contingency: as if one makes a lease to J. S. for his life, and after the death of J. D. to remain to another in fee, this remainder doth depend in contingency; for if J. S. dies before J. D. the particular estate is determined before the remainder can begin. So and on the same reason it is adjudged, in Colthurst and Bejushing's case, in Plow. Com. where the case in effect is, that a lease is made to A. (c) for life, the remainder to B. for life, and if B. dies before A. that it shall remain to C. for life, this is a good remainder on contingent, if A. survives B. which case is all one in reason with the common case which is often agreed in our books. A lease is made to one for life, the remainder to the right heirs of J. S. this remainder is good upon a (d) contingent, that is to say, if the lessee for life survives J. S. otherwise not. So, and for the same reason, if a man having issue a son of the age of nine years, makes a lease until his son shall attain to his full age, and after he shall accomplish his full age, that it shall remain over to another in fee, nothing vests (without question presently) in him in remainder, which was granted by the whole court. And it was said by the plaintiff's counsel, that such remainder is utterly void, and yet may take effect; for inasmuch as the remainder ought to pass out of the lessor presently, either to him in remainder, or to be in abeyance and custody of the law, and a freehold cannot in such case be in (e) abeyance, for this cause the remainder is utterly void: as if a (f) man makes a lease to A. for twenty-one years, if B. shall live so long, and after the death of B. that it shall remain over in fee, this remainder is void: so if a (g) lease for years be made, the remainder to the right heirs of J. S. this remainder is void, *quod fuit concessum per totam curiam*.

Also it was said, that when a remainder is limited to take effect on the doing of an act, which act will be the determination of the particular estate, yet if the act depends on a casualty and mere incertainty, whether it will ever happen or not, there also the remainder doth depend in contingency, and shall not presently vest: as if (h) A. makes a feoffment to the use of B. till C. come from Rome to England, and after such return from Rome to England, to remain over in fee, this remainder doth depend in contingency; for it is incertain whether C. will ever return into England or not, which was granted by the

(a) 2 Rol. 419.
Raym. 144.

(b) 10 Co. 85.
a. b. 2 Rol. 419.
Lit. Rep. 219.

Co. Lit. 378.

(c) Plow. 22. a.
24. b. Raym.
144. Lane 22.

(d) Raym. 144.
2 Co. 51. b.
Co. Lit. 343. a.
10 Co. 50. b.

(e) Co. Lit.
342. b. 9 H. 7.
2. b. Br. extinguishment 53.
Plow. 229. b.
280. a. 486.
Lit. sect. 647.
Plow. 557. b.
558. a. Dy. 71.
pl. 43, 190.
pl. 18. pl. 20.
Hob. 153, 281.
1 Co. 150. a.
135. b. 3 Co.
2. a. 10. b.
Hob. 94, 171,
253, 335, 336,
338.
(f) Raym. 144.
2 Co. 55.
(g) Hob. 153.
(h) Lit. Rep.
316.

the whole court. And so it was concluded by the plaintiff's counsel, that for all these causes judgment ought to be given for the plaintiff. Against which it was argued by the defendant's counsel, and they conceived, the remainder vested in Hugh presently, by the death of the deviser, and by his death, without issue, the land did descend to Philip his brother, who leased to the defendant. For it was said, that in this case, although Hugh died before his full age, yet the interest and term of the executors did not cease; and their reason was, because in wills, the (a) intent of the deviser is to be considered; and when he deviseth his lands to his executors, until Hugh his son shall come to his full age for payment of his debts, and to perform his will, it is to be intended he hath computed, (b) that the profits to be taken of his lands by his executors, during the minority of his son (which was for the space of twelve years) would suffice to pay his debts, and perform his will, and that he did not intend it should determine by the death of his son; for then the means which he had prescribed to satisfy his debts, and perform his will, would be defeated, and by consequence his debts remain unsatisfied, and his will unperformed; and therefore this case of a devise doth differ from a lease or a grant made in the like manner. For the deviser is intended to be (c) *inops consilii*, and therefore, the law will be his counsel and according to his intent appearing in his will, will supply the defect of his words: and therefore, where the deviser saith, (d) "until such time as Hugh Boraston shall accomplish his full age of twenty-one years," the law, which favours the performance of wills (according to the intent of the deviser) in construction will make it, "until such time as Hugh Boraston should have come to his full age of twenty-one years:" for when the deviser by apt words and terms, might have by good advice made his will good and sufficient in law, according to his true intent, there, although the deviser being hindered by sickness, or for want of good advice, makes his will in a disordered manner, and in barbarous and unfit words, the law in such case will reduce his words, which want order, into good order, and sentence his unfit words to words sufficient in law, according to his intent which appears by his own words. As Mich. 32 & 33 Eliz. in the King's Bench, it was adjudged between (e) Wellcoke and Hammond in trespass, upon not guilty pleaded, the case upon special verdict was such: a copyholder in fee of land dispendible in Borough English, having three sons and one daughter, devised his land to his eldest son, (f) paying to his daughter, and to each of his other sons 40s. within two years after his death; the deviser made a surrender according to the custom of the manor, to the use of his will, and died, the eldest

(a) 2 Bulstr. 128.
 Postea 27. b.
 Co. Lit. 322. b.
 Fitzgib. 10.
 (b) 2 Bulstr. 125.
 Lane 58.
 (c) Co. Lit. 9. b.
 8 Co. 95. a.
 3 Bulstr. 106.
 1 Co. 85. b.
 (d) Swinb. 135.
 2 Bulstr. 125.
 (e) Cro. Eliz.
 204. 1 Co. 41. a.
 Cro. Jac. 57.
 527, 592.
 2 Bulstr. 273.
 Latch. 9.
 Bridgm. 138.
 1 Mod. Rep. 86.
 Vaugh. 271.
 Cart. 93, 226.
 Swinb. 113, 114.
 2 Leon. 114.
 2 Rol. Rep. 219.
 Bridgm. 138.
 Goldsb. 134.
 Cro. Car. 158.
 (f) Swinb. 113.
 Co. Lit. 9. b.
 236. b. Bridg.
 138. Goldsb.
 134. Cr. Eliz.
 205, 833, 378,
 919. Cro. Car.
 158, 159. Cro.
 Jac. 416, 527,
 591, 599, 600.
 Godb. 280.
 2 Rol. Rep. 80.
 Noy 51. Moor
 644. 3 Keb. 96.
 1 Mod. Rep. 263.
 Lit. Rep. 259.
 2 Jones 107.
 Hob. 65. Dyer
 371. pl. 5.
 B. N. C. 125.
 29 H. 8. Br.
 Testam. 181.
 Cart. 226.
 1 Vent. 227.
 4 Ed. 6. Estate
 Br. 78. O. Benl.
 24, 25.

eldest son is admitted, and doth not pay the money within two years, the youngest son, now plaintiff, entered into the land; and it was adjudged that his entry was lawful: and in that case two points were resolved.

1. Although the yearly profits of the lands for two years exceed the money to be paid to his sons and daughter, yet the eldest son had a fee-simple; for the recompence and consideration, although it be not to the value of the land, in case of a will, doth make it in construction a fee-simple: and in the books of (a) 4 E. 6. Estates Br. 78. & 29 H. 8. Testament 18. 22 Eliz. Dyer 371. (b) no mention is made of the value of the land, no more than in the case of bargain and sale of land in 4 E. 6. Estates 78. yet the fee-simple of the use shall pass.

2. It was resolved, although in the case of a will, this word (paying) makes a condition; yet in that case the law would construe this unapt word (paying) to a limitation, for if it should be a condition, then it would descend on the eldest son, and then it would be at his pleasure whether his brothers or sister should be paid or not; and therefore it was adjudged, that in that case the law would construe it for a (c) limitation, of which the youngest son in Borough English might take advantage, and to amount to as much as if he had made the devise of the land to his eldest son, till he shall make default of payment, &c. and so the doubt in 14 Eliz. Dyer 317. (d) moved by Manwood, is well resolved. Upon which it was concluded in the case at bar by the defendant's counsel, that the executors had a good (e) term for twelve years, which was not determined by the death of Hugh Boraston; which was granted by the whole court. And the general rule put by the counsel of the other side was well agreed, that the remainder ought to commence in possession, when the (f) particular estate ends, as well in wills as in grants, and there cannot be a mean time between them; but that doth not concern the case at bar, for here inasmuch as the term did not end by the death of Hugh Boraston, the remainder did begin in possession (g) at the end of the term. And as to the incertainty, it was said, that the case at bar is no other in effect, but that a man devises his lands to his executors (for the payment of his debts) until (h) his son shall or should have come to his full age (of twenty-one years) the remainder to his son in fee; for altho' these are adverbs of time, when, &c. and then, &c. yet they do not amount to make any thing to precede the settling of the remainder, no more than in the common case (i). A man leases land for life or years, and after the decease of the lessee, or the term ended, the remain. to another, yet it shall remain presently; for when these adverbs refer to a thing, which must of necessity

happen,

(a) Cro. Jac. 527, 416.
Co. Lit. 9. b.
6 Co. 16. a.
Swinb. 118.
Cro. Eliz. 205.
29 H. 8. Br. Testament 18.
(b) Dyer 371.
pl. 5. Cr. Jac. 527. Co. Lit. 9. b.
(c) Dyer 74. pl. 16. Plowd. 413.
a. 10 Co. 41. a.
Cart. 93, 171.
Cro. Jac. 57.
2 Rol. Rep. 219.
425. Cro. Eliz. 205, 833, 920.
Goldsb. 134.
Noy 51. Owen 112. Plowd. Queries 108.
1 Leon. 283.
1 Rol. 411.
(d) Dyer 316.
pl. 5. 2 Leon. 114. 1 Mod. Rep. 86.
(e) Cro. Jac. 510. Hard. 80.
(f) 1 Co. 66. b. 129. b. 130. a. 134. b. 135. b. 138. a. 2 Co. 51. a. Plowd. 25. b. 29. a. b. 35. a. Raym. 54. 2 And. 37. Moor 104. Perk. 12. Raym. 413. Palm. 139. Poph. 82, 83, 84.
(g) 10 Co. 85. b.
(h) Sty. 204. Dall. 58. Moor 48.
(i) 10 Co. 85. b. Cro. Jac. 510. Palm. 141.

Hard. 80.

happen, there they make no contingency, and it is certain that every man must die, for *statutum est hominibus semel mori*, and every term will end; for *tempus edax rerum*: and in the case at bar, certain it is, that Hugh would or might have accomplished his age of twenty-one years, which are in this case of a will, all one in construction of law. So that these adverbs (*then* and *when*) in our case, are demonstrations of the time, when the remainder to Hugh shall take effect in possession, as in the said cases of a lease for life, and lease for years, and not when the remainder shall vest; *quod fuit concessum per totam curiam*. And judgment was given, that the plaintiff should take nothing by his bill.

Doff. pla. 176.
2 Co. 61. b.
Cro. Car 527.
Dyer 93.

Egerton, the Queen's solicitor, Thomas Forster, and others, were of counsel with the plaintiff, and Coke and others with the defendant; and note in the declaration it doth not appear that the husbands and wives made the lease to the plaintiff by deed; and no exception was taken to it.

W A L K E R's Case.

Pasch. 29 Eliz. Between Walker and
Harris, in the King's Bench

W. leases to H.
for years, H.
assigns his in-
terest to J. S.
Then W.
brings debt o-
gainst H. and
held Well.

THE case was in effect; Walker leased certain lands Harris for years, the lessee assigned all his interest to another, Walker brought an action of debt against Harris for rent behind, after the assignment, and whether the action were maintainable or not, was the question. And it was objected against the action, that the land was debtor, and not the person, but in respect of the land; and a difference was taken between a personal and a real contract, for if a man lets a stock of cattle or other goods for years, rendering rent at several days, he shall not have an action of debt till all the days be incurred. So if a man makes an obligation or other (a) contract to pay several sums at several days, he shall not have an action of debt till all the days are past. But in the case of a lease for years, which is a real contract, the lessor shall have an action of debt after every day, as appears by 45 E. 3. 8. 2 E. 4. 11. which proves that the lessee is not charged in respect of any personal contract, but in respect of the realty. And therefore, when the lessee assigns over all his interest, all the realty, which always follows the land, is gone. Also, if a man sells goods for money to be paid at several days, in such case, altho. the goods be taken by one who hath right before the day, yet the seller shall have an action of debt in respect of the contract: but if a man makes a lease for years rendering rent, if before the day incurred the lands be (b) evicted by title paramount, the lessor shall not have an action of debt in respect of the contr. because it is a real contract, and follows the estate of the land, and the rent issues out of the land, and the person is not the

Moor 351. Cro. 1
El. 556, 713.
1 Syd. 266, 402.
Poph. 120.
(a) Co. Lit.
47. b. 292. b.
1 Rol. Rep. 29,
30, 221, 601.
2 Rol. Rep. 47.
F. N. B. 130. h.
267. b. 4 Co.
94. b. 5 Co. St.
b. 8 Co. 153. a.
10 Co. 128. b.
Moor. 13. 3 Le-
on 4. Bendl. in
Kel. 208, 209.
Bendl. in Ath.
10 O. Bendl. 3.
pl. 8. N. Bendl.
57. pl. 93. Cro.
El. 118, 776.
807. Cro. Jac.
504. Cro. Car.
241. 2 Leon.
107, 108.
4 Leon. 13.
Owen 42. Yelv.
67. Br. Action
sur le Cafe in
fine. 2 Inst. 395.
2 Sand. 337.
(b) Cro. Jac.
310. 10 Co.
128. a. Dy.
56. pl. 15.
B. N. C. 52.
2 Rol. 235.

See 1 Salk. 81,
82.

(a) Co. Lit.
148. a. Dy. 5.
pl. 6.
(b) Cro. Eliz.
793. Mo. 114.
1 Rol. 235.
2 Inst. 504.

(c) Fitz. Det.
42. Br. Obliga-
tion 6. Br. Ap-
portionment 1.
Br. Condition
207.
(d) 9 Co. 135.
Br. Apportion-
ment 7. Br. Bar.
39. Co. Lit.
148. b.

(e) 2 Rol. 346.
Dyer 55. pl. 5.
Kel. 49. pl. 5.
(f) Br. Quare
Imp. 62. Br.
Brief al Eve(sq.
29. Fitz. Pre-
sentment al E-
glife 2.
*Co. Lit. 166. b.
186. b. F. N. B.
33. m. 34. v.
Cr. El. 18, 19.
2 Inst. 364, 365.
(g) Lit. Sect.
352. Co. Lit.
169. b.
(h) Fitz. Det.
101. Br. Det.
140.
(i) Ventr. 99.
(k) 1 Syd. 266.
Moor 351.
Poph. 120.
2 Sand. 182.
Cr. El. 715.
Cro Jac. 523.

the debtor but in respect of the land; for if the lessee grants over all his interest, the lessor may have an action of debt against the assignee, with whom there was no contract by deed. But forasmuch as the rent issues out of land, the assignee who hath the land, and is privy in estate, is debtor in respect to the land: so if a (a) man leases three acres, rendering rent, and the lessor ousts the lessee of one acre, he shall have an action of debt for no part; (b) but if the lessor recovers part in an action of waste, or enters into part for a forfeiture, or by surrender, or by special condition for entry into part; or if part of the land be evicted by title paramount; in all these cases the rent reserved on the lease for years, which is a rent-service, shall be apportioned. *Ergo*, the contract follows the land, for otherwise the lessor might in all those cases have an action of debt for the whole rent in respect of the contract, as he shall have on a sale of goods; for which matter see (c) 20 H. 6. 23. a. (d) 9 E. 4. 1. a. 21 E. 4. 29. a. b. which book is to be intended of a lawful entry, as for a forfeiture, or by surrender, and not of a tortious entry, 4 H. 7. 6. 7 E. 6. Tit. Apportionment, Br. 26. 25 H. 8. 36. 13 H. 8. 30 H. 8. Apportionment, Br. 7. 3 H. 7. 17. And so all the books are well reconciled. So it appears, that although in every lease for years there is a contract between the lessor and lessee, yet that contract is annexed to an estate, and follows the land. So on the other side, if the lessor grants over his reversion now, the contract runneth with the estate, and therefore the grantor shall not have any action of debt for rent due after his assignment, but the grantee shall have it, for the privity of the contract follows the estate of the land, and is not annexed to the person, but in respect of the estate: as where there be divers (e) parceners of an advowson, the eldest hath prerogative to make the the first presentment; but it is not in respect of her person only, but as it is annexed to her estate. For as (f) 5 H. 5. 10. b. it is agreed, her husband, who is tenant by the courtesy, shall have it: so if one coparcener hath a rent granted her for (g) owelty of partition, she may distrain for it of common right, without any words of distress; and so shall her grantee, for it was not annexed to her person only, but to the estate also, as it is held in 21 H. 6. 11. So the grantee of a reversion and the lord by escheat shall have an action of debt for the rent, as it is held in (h) 5 H. 7. 18. b. for the contract is incident to the estate: and it was (i) said, that it was held by Sir Ro. Catlin, late Chief Justice, that the lessee shall not be charged for rent due after the assignment. But on great deliberation and conference with others, it was adjudged by Wray, L. C. J. Sir Thomas Gawdie, and the who court of King's Bench. That the (k) action would lie (after such assignment.)

And first for the apprehending of the true reason of this case,

case, and of all the other cases, which have been urged on the other side, (for the law always, and in all cases, is consonant to itself) it is to be known, that as to the matter now in quest. there are three manner of (a) privities, *scil.* privity in respect of estate only, privity in respect of contract only, and privity in respect of estate and contract together: privity of estate only; as if the lessor grants over his (b) reversion (or if the reversion escheat) between the grantee (or the lord by escheat) and the lessee is privy in estate only, so between the lessor and the assignee of the lessee, for no contract was made between them. Privity of contract only, is personal privity, and extends only to the person of the lessor and to the person of the lessee, as in the case at bar, when (c) the lessee assigned over his interest, notwithstanding his assignment the privity of contract remained between them, although the privity of estate be removed by the act of the lessee himself; and the reason thereof is,

First, because the lessee himself shall not prevent by his own act such remedy which the lessor hath against him by his own contract, but when the lessor grants over his (d) reversion, there, against his own grant, he cannot have remedy, because he hath granted the reversion to another, to which the rent is incident.

Secondly, the lessee may grant the term to a poor man, who shall not be able to manure the land, and who will, for need or for malice, suffer the land to lie fresh, and then the lessor will be without remedy either by distress or by action of debt, which would be inconvenient, and in effect concerns every man; (for, for the most part, every man is a lessor or a lessee) and for these two reasons, all the cases of entry by wrong eviction, suspension and apportionment of rent are answered: for in such cases either it is the act of the lessor himself, or the act of a stranger; and in none of the said cases the sole act of the lessee himself shall prevent the lessor of his remedy, and introduce such inconveniencies, as hath been said.

The third privity is of contract and estate together, as between the lessor and the lessee himself; and Wray, Chief Justice and Sir Tho. Gawdy said, that as he who is a bastard born hath no cousin, "so every case imports suspicion of its "legitimation, unless it has another case which shall be as a "cousin-german, to support and prove it." And therefore it was agreed by the whole court, that if there be lord and tenant, and the tenant makes a feoffment in fee, in this case betwixt them for the (e) arrearages due as well before the feoffment as after, till notice, &c. it is only privity as to avowry, and not any privity in estate or in tenure, which privity shall not go with the estate, and yet it is more in the realty than the case at bar; *a fortiori* in the case at bar, when the lessee assigns his int. yet privity of contract between the lessor and lessee, as to the action of (f) debt remains.

And

(a) Lit. sect.
454. Co. Lit.
271. a. 4 Co.
123. b. 124. a.
8 Co. 42. b.
1 Jones 32.
Cro. Car. 184.
2 Inst. 516.
(b) Cro. Car.
184.

(c) Cro. Car.
222.

(d) Lit. sect.
229. Co. Lit.
152. a.
Q. the late stat.

Skin. 610.

Lit. sect. 457.
Co. Lit. 269. b.

(e) 2 Rol. Rep.
247. Cro. Jac.
334.

(f) Cro. Car.
222.

(a) 2 Inst. 500,
501. 4 H. 6. 20.

And at the com. law, before the stat. of (a) *quia emptores terrarum*, if the tenant made a feoffment in fee to hold of the Chief Lord, the feoffee could not by any tender that he could make, compel the lord to avow on him; but the lord always might avow on the feoffor, as appears in 33 E. 3. Avowry 255. For by his own act he cannot change the avowry of his lord; which is a stronger case than the case at bar: and in the same case, if the lord granted over his feignory, or if the feoffor died, there the privity, as to avowry, is destroyed; for it is personal, and holds only between the lord himself and the feoffee himself: so, if after the assignment of the lease, the lessor grants over his reversion, the grantee shall not have an action of debt against the lessee, for the privity of contract, as to the action of (b) debt, holds only betwixt the lessor himself and the lessee himself: so in such case, if the lessee dies, the lessor shall not have an action of debt against his (c) executors; for the privity consists only between the lessor and the lessee. See for the case of avowry. Litt. Chap. Releases, 106, (d) 107. 4 E. 3. 22. 2 E. 4. 6. 34 H. 6. 46. 37 H. 6. 33. 7 E. 4. 28. 24 H. 8. Dy. 4. (e) 29 H. 8. tit. Avow. Br. 111.

(b) 2 Sand. 181,
182.

(c) Yelv. 103.

Styl. 52, 61, 118,

119. Cro. Jac.

549. 2 Rol. Rep.

131. Palm. 116,

117. All. 34.

(d) Co. Lit.

268. a. Lit. sect.

454. Post. 35. a.

(e) Cr. El. 169.

(f) Co. Lit.

54. a. 316. a.

273. a. 9 Co.

142. a. 2 Rol.

Abr. 828. 30 E.

3. 16. a. b. F.

N. B. 55. c. 56. f.

Cro. El. 358.

Fitz. Waste 122

2 Inst. 301.

11 H. 4. 19. a.

Br. Waste 66.

Reg. 72. a.

(g) Co. Lit. 54.

a. 2 Inst. 301.

2 Rol. Abr.

828. F. N. B.

56. f. 3 Co. 64.

(h) Post. 65. a.

4 Co. 49. a.

F. N. B. 120. h.

122. a. Br. Ar-

rearages 11.

Br. Entre cong.

90. Br. Rent

15. Kelw. 153.

b. 112. b.

(i) Mo. 351.

Cr. El. 328.

556, 633. Poph.

55, 120. Goldsb.

182. 1 Jones 44.

244. Ungle and

Glover. Hut.

69. 1 Brownl.

56.

So if tenant in (f) dower, or tenant by the curtesy, grants over their estate, yet the privity of action remains between the (g) heir and them, and he shall have an action of waste against them for waste committed after the assignment: but if the heir grants over the reversion, then the privity of the action is destroyed, and the grantee cannot have any action of waste, but only against the assignee; for between them is privity in estate, and between the grantee and the tenant in dower, or tenant by the curtesy, is no privity at all. See F. N. B. 56. f. Temp. E. 1. waste 122. 18 E. 3. 3. 30 E. 3. 16. 36 or 38. E. 3. 23. 11 H. 4. 18. And it was agreed, that if the lessor enters for condit. broken, or if the lessee surrenders to the lessor, now the estate and term is determined, and yet the lessor shall have an action of debt for the (h) arrearages due before the condit. broken, or the surrender made, as it appears by F. N. B. 120. 30 E. 3. 7. 6 H. 7. 3. b. F. N. B. 122. (against the book of 32 E. 3. Bar. 262. which is not law) and that in respect of the contract between the lessor and the lessee. Note, reader, so great was the authority and consequence of this judgment, that after this time, not only the point adjudged hath been always affirmed, but also all the differences in this case taken by Wray, C. J. and the court have been adjudged, as you may learn by the cases following Hil. 36. Eliz. in the K's B. Rot. 420. between (i) Ungle and Glover it was adjudged, that if the lessee for ys. assigns over his int. and the lessor by deed indent.

and

and enrolled according to the stat. bargains and sells the revers. to another, that the bargainee shall not have an action of debt against the lessee, for there is no privity betwixt them. But it was unanimously agreed by Popham Ch. Justice Clench, Gawdy and Fenner Justices, that after the assignment the lessor himself might have an action of debt against the lessee for rent due after the assignment Trin. 37 Eliz. in the King's Bench, Rot. 1042. between (a) Overton and Sydhall two points were resolved by Popham C. J. and the whole court.

1. That if the executor of a lessee for years assigns over his interest, that an action of debt doth not lie against him for rent due after the assignment.

2. If the lessee for years assigns over his interest, and dies, the executor shall not be charged for rent due after his death; for, by the death of the lessee, the personal privity of contract, as to the action of debt in both cases, was determined. And Mich. 40 & 41 Eliz. between (b) George Brome, Esq. plaintiff and Hore defendant the case, in effect was such: A. leased to C. 3 acres of land for years rendering rent, the said C. assigned all his estate in one acre to another, A. suffered a common recovery to the use of B. in fee, who brought an action of debt against the first lessee, and it was adjudged by Popham, C. J. and the whole court, that that action did lie; for in as much as the lessee had assigned his interest but in part, and remained possessed of the residue, that not only the lessor, but also his assignee, or he who claimeth under him shall have an action of (c) debt for the whole rent against the lessee, for there was not privity of contract only, but also privity in estate and contract together; and therefore the action in this case shall go with the estate; as at common law, if before the stat. of (d) *quia emptores terrarum* the tenant had made a feoffment in fee of part of the tenancy, there was not any apportionment, but the lord, or his grantee, should avow on the feoffor for as much as he remained tenant in respect of the residue: but if he had made a feoffment of the whole, then the grantee of the lord should not avow on him, as it hath been said before: See 22 Aff. 52. 24 H. 8. 4. b. 32 H. 8. Br. Accept. for this matter. And Popham C. J. in this case said, that in case when rent reserved on a lease for years shall be (e) apportioned, if in an action of debt the lessor demands more *quam oportet*; yet on *nihil debet* the lessor shall recover as much as shall be apportioned and assessed by the jury, and shall be barred for the residue. And Pasch. 41 Eliz. Rot. 2485. in the Common Pleas, (f) Samuel Marrow brought an action of debt against Francis Turpin, and W. Turpin, administ. of Geo. Turpin, and declared on a demise made by the plaintiff by deed indented of certain land to the intestate for years rendering rent, and for rent behind after the death of the intestate, the action was brought; the defendants pleaded, that before the rent behind, one

Poph. 137.

Dyer 4. b. Cro. El. 328.

Overton and Sydhall's Case.

1 Sand. 240.

2 Sand. 304.

(a) Poph. 120.

Co. Entr. 123.

Gould. 120.

Moor 351.

1 Syd. 240, 266.

Swinb. 329.

Co. Ent. 122. a.

Cro. El. 555.

Cro. Car. 188.

2 Sand. 304.

2 Ventr. 209.

Latch. 260, 261,

262, 271. Sty.

407.

Godb. 277.

Palm. 117.

3 Bulst. 311.

Brome and

Horne's Case.

(b) Cro. El. 633.

Godb. 277.

(c) Cro. Car.

222.

(d) Dyer 4. pl. 4.

3 Keb. 583.

2 Inst. 500, 501.

(e) 2 Inst. 504.

1 Brownl. 186.

1 Rol. 237. 1 Syd.

6 Yelv. 114.

Marrow and

Turpin's case.

(f) Moor 600.

2 Anderl. 133.

2 Bulst. 152.

Cro. El. 715.

Latch 260, 261,

262. 2 Ventr.

209, 210.

of

(a) 2 Bulstr. 151.
152. 2 Rol. Rep.
366.

(b) 1 Jones 223.
Cro. Car. 188.

(c) Antea 24. a.

(d) 3 Bulstr. 152,
153. Cro. Car.
334. 1 Sand. 240.

(e) Co. Lit. 269.
b. Postea 65. b.
66. a. 6 Co. 58.
a.

of the defendants had (a) assigned all his interest to Thomas Boorde, of which assignment the plaintiff had notice, and accepted the rent by the hands of the assignee, due at a day after the assignment, and before the day on which the rent was due which is now demanded, upon which the plaintiff did demur. And it was adjudged against the plaintiff, because the privity of the contract, as to the action of debt, was determined by the death of the lessee; and therefore, after assignment made by the (b) administrator, debt did not lie against the administrator for rent due after the assignment, according to the judgment given in (c) Overton and Sydhall's case before.

Also it was said, if the lessee assigns over his term, the lessor may charge the lessee or his assignee at his election; and therefore if the lessor (d) accepts the rent of the assignee, he hath determined his election, and shall not have an action against the lessee afterwards for rent due after the assignment, no more than if the (e) lord once accepts the rent of the feoffee, he shall not avow on the feoffor: and by these judgments and resolutions you will the better understand your books; betwixt which *prima facie* seems to be some diversity of opinions. *Vide* 44 E. 3. 5. & 44 Aff. 18. 9 H. 6. 52. by Paston, which agree with the judgment of Sir Christopher Wray. See 8 Eliz. Dyer 247. and the *quære* there made, is now well resolved.

BUTLER and BAKER's Case.

• Rep. Q. A.
106, 121, 122,
160. &c.
Fitzg. 231.

Mich. 33 & 34 Eliz.

In the King's Bench.

IN an action of trespass brought by John Butler against Thomas Baker and Thomas Delves, defendants, for a trespass in parcel of the manor of Thoby, in the county of Essex, and not guilty pleaded, the jury gave a special verdict to this effect; William Barners seised of the manor of Hynton in the county of Gloucester, had issue William his eldest son, Thomas and Leonard Barners; and that William the son, married Elizabeth Eden; and afterwards 2 & 3 Phil. & Mar. William, the father, in consideration of the said marriage, and for a jointure for the said Elizabeth, did enfeof of the said manor of Hynton, Robert Rochester, Knt. and others, to the use of the said William the son, and Elizabeth his wife, and the heirs of their two bodies begotten; and afterwards William, the father, died, whereby the reversion of Hynton descended to William the son; and that William the son was also seised of the manor of Thoby, (whereof the place in which is parcel) and of certain lands in Fobbing in the county of Essex in fee, and had issue Thomas and Grisild, now the wife of Baker, one of the defendants; and afterwards William the son, by his last will in writing devised, that Elizabeth his wife should have and hold during her life the manor of Thoby, in consideration of her jointure and dower in all his other manors and lands; provided always, that if the said Elizabeth should take herself to any former jointure of any lands of William the son, that then the said will of the manor of Thoby, as to the said Elizabeth, should be void: and after the death of the said Elizabeth, the said manor of Thoby should remain to Thomas his son, and to the heirs males of his body; the remainder to the heirs males of the body of the said William the son; the remainder to Thomas his brother for life; the remainder to his eldest son, in tail, &c. the remainder

D

to

Poph. 87.
1 Anderf. 348.
Moor 254.
Goldsb. 84.
3 Leon. 271.
10 Co. 80. b.
84. a. b. Co.
Lit. 111. b.

to Leonard Barners, and to the heirs males of his body; the remainder to Richard Barners in tail; the remainder to the right heirs of William Barners the son. And that William the son so as aforefaid seised of all the premises, died thereof seised; and that the manors of Thoby and Hynton were held of the Queen *in capite* by knights service, and that after the death of William the son, his wife by word *in pais* did wave her estate in Hynton, and agreed to the manor of Thoby, and entered into it; and that the manor of Hynton and the lands in Fobbing were an entire third part of all the lands and tenements whereof William the son died seised. And that Thomas the son of William the son, and Thomas the son of the father, were dead without issue, by which Leonard entered into the manor of Thoby, and took to wife Mary Gedges, and died; Anthony his son assigned the said manor of Thoby to the said Mary for her dower, now the wife of Butler the plaintiff. And that Thomas Delves, one of the defendants, by the command of Baker, the other of the defendants, entered, &c. And if the entry of the said Delves were lawful, is the doubt; and the case in effect is such: William seised of Thoby and Fobbing, and William and Elizabeth his wife seised of Hynton, to them and to the heirs of their two bodies begotten, by estate made to them, during the coverture, for the jointure of the wife; the reversion to William in fee; Thoby amounting to the value of two parts, and Fobbing and Hynton to a full third part. Thoby and Hynton are held *in capite*; William by his will devised in writing Thoby to his wife for her life, on condition that she should not take her former jointure, with divers remainders over, and died; the wife *in pais* refused her former jointure in Hynton. If the will be good for the whole of Thoby, or but for a part. And two questions were moved in this case: 1. If the refusal *in pais* should divest the estate-tail which was vested in the wife? 2. Admitting the refusal *in pais* should divest it, if the refusal should have such relation that the will should be good for the whole manor of Thoby by the statutes of (a) 32 & 34 H. 8. or should be void for part? And this case was argued in the King's Bench by Egerton, the Queen's Solicitor, and Thomas Buckley for the plaintiff, and by Popham, the Queen's Attor. and Coke for the def. And afterwards Mich. 33 & 34 Eliz. the case was argued by the court, (b) and Fenner and Clench argued for the plaintiff, and Wray C. J. and Gawdy for the defend. And afterwards, the same term, the case was argued by the counsel on both sides in the Exchequer-chamb. before all the Justices of Engl. and Wray Chief Just. told me, that Anderson Ch. Just. of the Common Pleas, and Manwood Chief Baron did agree with him: and afterwards Wray Ch. Just. the last day of Easter term

(a) 32 H. 8. cap.
1. 34 H. 8. cap.
5. 12 Car. 2.
cap. 24. Co. Lit.
76. a. b.

(b) Poph. 88.
Moor 254.

term 34 Eliz. died, who was a most reverend Judge, of profound and judicial knowledge, accompanied with a ready and singular capacity, grave and sensible elocution, and continual and admirable patience; and Sir Jo. Popham, the Queen's late Attorney-General, did succeed him. And afterwards, in Michaelmas term 34 & 35 Eliz. Sir Roger Manwood Chief Baron died, who was also a reverend Judge of great and excellent knowledge in the law, and accompanied with a ready invention and good elocution; and Sir William Periam, Knt. late one of the Justices of the Common Pleas, succeeded him. And afterwards the case was oftentimes argued, as well in the Exchequer-chamber as at Serjeants Inn, before all the Justices of England and Barons of the Exchequer; and after many conferences between themselves, judgment was ordered to be entered for the defendant, which was done in the King's Bench accordingly; and in this case divers points were resolved.

First, that at the common law, if lands be given to husband and wife in tail, or in fee, and the husband dies, there the wife cannot devise the freehold out of her by any verbal waver or disagreement *in pais*. As if before any entry made by her, she saith that she utterly waves and disagrees to the said estate, and will never take or accept thereof; yet the freehold remains in her, and she may enter when she pleases: so if before her entry, she reciting her estate, had said by word *in pais* that she doth assent and agree to the said estate, or words tantamount, yet she might afterwards wave it in a court of record; for a verbal assent and agreement *in pais*, as it was held by divers in such case, is not of any effect in law; for the law doth more respect an act without words, than words without an act; and therefore if she enters into the land and takes the profits, although she saith nothing, it is a good agreement in law, for the law doth respect deeds; but words without an act are not in this case regarded in law, as it is adjudged in M. 34 E. 1. Avowry 232. that if a man takes a distress for one thing, yet when he comes into a court of record, he may avow for what thing he pleases; *a multo fortiori* when a freehold is vested in him it cannot be devised by bare words *in pais*; and therewith agrees 17 Poph. 89. 17 Aff. E. 3. 6. & 17 Aff. where the husb. aliened his land, and took back an estate to him and his wife in tail, the husband died, the lord of whom the land was held, by knights service, supposing the husb. died sole seised, by word assigned dower to the wife, which she accepted; yet it was adjudged that this refusal of the estate of inheritance and acceptance

13 R. 2. Joint-
tenancy 9.
Rep. Q. A. 39.

of her dower *in pais* should not devest the freehold out of her. Also in 13 R. 2. Joint-tenancy, the case was, a charter of feoffment was made to four, and seisin was delivered to three in the name of all; and after the seisin was given, the fourth came and saw the deed, and said by word that he would have nothing in the land nor agree to the deed, but disagree; and it was adjudged that this disagreement by word *in pais* should not devest the freehold out of him. And Thorpe in 35 E. 3. tit. Disclaimer saith, that in such case the tenancy doth remain *in toto* till disagreement in a court of record. Another reason was alledged, that a freehold should not so easily be devested by bare word *in pais*, to the end that the tenant to the *præcipe* should be the better known: but as an act *in pais* may amount to an agreement, so an act *in pais* may amount to a disagreement, but that is always of one and the same thing: as if lord and tenant be, and the tenant by deed doth enfeoff the lord and a stranger, and makes livery to the stranger in the name of both; in this case, if the lord, by word, disagree to the estate, it is nothing worth; and on the other side, if he enters into the land generally, and takes the profits, this act will amount to an agreement to the feoffment; but if he enters into the land, and distrains for his seignior, this act amounts to a disagreement to the feoffment; and will devest the freehold out of him; and therewith agrees 10 E. 4. 12. (b) by all the Justices: and yet in some case a claim by word will direct an entry to be an agreement to one estate, and a disagreement to another. As if lands be given to husband and wife in tail; and after the stat. of (c) 32 H. 8. the (d) husband aliens the land to the use of him and his heirs, and afterwards devises it to his wife for life, and dies, the wife enters, claiming by word the estate for life; this is a good disagreement to the estate of inheritance, and a good agreement to the estate for life; and therewith agrees 18 Eliz. Dyer 351. b. for there is not any doubt of the tenant to the *præcipe*, and the act and the words work together. But if the wife, before her entry, agrees by word to one estate, and disagrees to the other, it is nothing worth; but if A. makes an obligation to B. and delivers it to C. to the use of B. this is the deed of A. presently: but if C. offers it to B. there B. may refuse it *in pais*, and thereby the obligation will lose its force, (but perhaps in such case A. in an action brought on this obligation cannot plead *non est factum*, (e) because it was once his deed;) and therewith agrees Hil. 1 Eliz. Rot. 442. in Tawe's (f) case, reported by Serjeant Bendloes, and by the Lord Dyer, Hil. 1 Eliz. 167. The same law of a gift of goods and chattels, if the deed be delivered to the use of the donee, (g) the goods and chattels are in the donee presently

(b) 3 Leon. 372.
Br. Extinguishment 33.

(c) 32 H. 8.
cap. 28.
(d) Dyer 351.
pl. 24. 8 Co. 72.
b. 1 Co. 87. b.
Co. Lit. 357. a.
Hob. 71. Cro.
Jac. 490.
1 Brownl. 140.
1 Leon. 84.
Moor 493.
2 Rolle's Rep. 36.

(e) 5 Co. 119. b.
5 Co. 84. Cr.
Eliz. 54, 637.
2 Leon. 110, 111.
Doct. pl. 260,
261.
(f) N. Benl. 75.
Co. Ent. 145.
nu. 24.
(g) Dyer 49. a.

presently, before notice or agreement; but the donee may make refusal *in pais*, and by that the property and interest will be devested, and such disagreement need not to be in a court of record. Note, reader, by this resolution you will not be drawn to error by certain opinions delivered by the way, without premeditation, in 7 E. 4. 7. a. b. & 19. b. 8 E. 4. 29. a. 8 H. 7. 13. (a) 39 H. 6. 44. b. and other books *obiter*.

Secondly, it was resolved, that though the estate is created by limitation of use, by limitation made after the stat. of 27 H. 8. which statute hath transferred the use into possession, for so is the usual pleading *de usibus in possessionem transferendis*, and although an (b) use might have been waved by word *in pais* before the said stat. yet now the statute doth incorporate the use and possession of the land, and hath coupled them together with an indissoluble conjunction, and therefore no more than an estate created by feoffment, gift, or grant can be waved *in pais*, no more can such estate created by limitation of use: which matter, on these words of the said act, (*in such manner, form, and condition*) is well and at large explained and resolved in (c) Dillon and Frein's case, and in (d) Corbet's case: and therefore it was resolved in this case at bar, the refusal *in (e) pais* to have the manor of Hynton, and the entry and agreement to the manor of Thoby was a good agreement to one, and a refusal to the other, and thereby the inheritance was devested, and that by force of the statute of 27 H. 8. cap. 10. *versus finem*, concerning jointures of wives; by which it is provided, "That if any wife shall have any manors, &c. unto her given, or assured, after marriage, for term of her life, &c. that then such wife, over-living her husband, shall and may at her liberty, after the death of her said husband, refuse to have, and take the lands, &c. and to have, demand, and take her dower; any thing in this act to the contrary notwithstanding." By which words it was unanimously agreed by all the Justices and Barons of the Exchequer, that the wife might refuse (f) her jointure *in pais*, and be endowed by consent *in pais*, or by writ of dower. And therewith agrees (g) Whorewood's case, 38 H. 8. Dyer 61. b.

The third point, and the great doubt of the case was on a branch of the stat. of (h) 34 & 35 H. 8. of wills, by which it is enacted, that the act of 32 H. 8. of wills, shall be extended, expounded, and taken, as hereafter ensueth, that is to say, "That the King shall have and take for his full third part of all such manors, lands, &c. whereunto he is or shall be entitled by the said former act, and by this present act, such manors, lands, and tenements, as shall

(a) Fitz. Release 17, 54.
Br. Release 45.
Br. Agreement.
3. Br. Fairs 80.

(b) 6 Co. 34. a.
2 Co. 53. b.

(c) 1 Co. 120,
&c. Poph. 70.
1 And. 309.
Jenk. Cent. 276.
(d) 1 Co. 83. b.
84, 85. Moor
631, 633.
2 And. 134.
(e) Poph. 88.
Moor 254.
Goldsb. 84.

(f) 4 Co. 3. a.
Plowd. 396. b.
Co. Lit. f. 36. b.
(g) Dyer 61.
pl. 31. Postea
28. a. b.
(h) Co. Lit. 76.
a. b. 111. b.
6 Co. 75. b. 76.
a. b. 1 Siderf. 56.

“ by any means descend, or come by descent, as well of
 “ estate of inheritance in fee-tail as fee-simple, or in fee-tail
 “ only, &c. immediately after the death of the same deviser
 “ or owner thereof. And that the will, &c. shall stand good
 “ and effectual in the law, albeit the same will, &c. be had
 “ and made of all his fee-simple lands, &c. or of the more
 “ part thereof.” And if in this case the refusal of Hynton
 hath such relation or operation in law, that now on the mat-
 ter, Hynton and Fobbing do descend immediately after the
 death of the deviser? And it was strongly objected, that now
 on the matter Hynton and Fobbing do descend immediately
 after the death of the deviser, within the intention and mean-
 ing of the said branch of the act of 34 & 35 H. 8. and that for
 divers reasons and causes.

(a) Popl. 89.
 1 Anderf. 350.
 1 Leon. 204.
 1 Co. 85. b.
 3 Co. 20. b.

1. Because this case doth consist on (a) construction of an
 act of parliament, and of a will or testament, both which are
 always construed and expounded according to the intent and
 meaning of the parties thereto, and not by any strict or strained
 construction.

(b) 1 Anderf.
 350.

2. This refusal shall have such relation and operation in law,
 that now on the matter Hynton immediately descends, and
 now *ab initio* the husband was sole seised of the manor of
 Hynton. And many cases were put on the general ground
 of relations. But I will report those only, which I conceive
 to be most material. It was said, that of a joint estate a wo-
 man shall not be endowed: but if (b) lands be given to hus-
 band and wife, and the heirs of the husband, or the heirs of
 their two bodies, or to their heirs, and afterwards the husband
 dies; now if she will wave and refuse the joint estate, the
 wife may bring her writ of dower, and thereby, in judgment
 of law, the husband shall be said sole seised *ab initio*; for
 otherwise the wife cannot be endowed, and yet in truth the
 husband and wife were joint-tenants during all the coverture;
 but now the refusal shall have such relation, that in judg-
 ment of law the husband was *ab initio* sole seised: and there-
 with agrees the book in (c) 11 E. 3. tit Dower 63. where the
 case was, lord and tenant of a house held by homage and 10s.
 rent, the tenant enfeoffed W. the lord granted the feignory
 to husband and wife in tail, W. attorned, the husband died,
 the feignory survived to the wife, and she brought a writ
 of dower, in bar of which the lord pleaded acceptance
 of homage, by which it was admitted, that the writ of
 dower did lie. In an action of waste brought by Rob. (d)
 Thetford against Andrew Thetford, Pasch. 28 Eliz. Rot. 122.
 in the Common Pleas, the plaintiff counted that J. A. gave to
 John Thetford and Thomasin his wife, and to the heirs of
 their bodies, (whose heir the plaintiff is) and that John and
 Thomasin, 3 & 4 Phil. & M. made a demise to the defend.

(c) 3 Leon. 272.
 Postea 28. b.
 Perk. 29. b.
 sect. 352.

(d) Co. Ent.
 719. nu. 12.
 1 Ander. 220,
 350. Sav. 109.
 2 Leon. 204.
 Lane 7.

for

for 21 years and that the donees were dead, and that the plaintiff was heir in tail, and that the defendant had done waste: the defendant pleaded *quod prædicti Johannes & Thomasina non dimiser*, &c. on which they were at issue: the jury found, that the said John and Thomasin, by their deed indentured, made the lease to the defend. for 21 years, *ut supra*, and that John died, and after his death Thomasin entered and disagreed to the said lease; and whether the issue was found for the plaintiff, for as much as it was found that both made the lease, as the plaintiff had counted, which was the point of the issue; or whether it was found for the defendant by matter *ex post facto*, that is to say, by the disagreement of the wife, was the question.

And after great consideration, and many arguments at the bar and bench, the Justices of the Common Pleas gave judgment for the defendant; for now by the disagreement of the wife, in judgment of law it was the lease of the husband only; and yet in truth, during the life of the husband, it was the lease of both, as it appears by 7 H. 4. 13. in Wast. 3 H. 6. 53. (a) in Wast. 22 H. 6. 24. (b) But now by the disagreement subsequent, and by relation and operation of law, it was *ab initio* the lease of the husband only; for if it *ab initio* had not been the lease of the husband only, the issue had been found for the plaintiff: and the case of Whorewood 38 H. 8. Dyer 61. b. was strongly urged, where the case was, that W. Whorewood, the King's late Attorney-General, being seised of the inheritance of lands of the value of 630l. in which the wife was a joint purchaser with her husband of 60l. by his last will in writing declared, that his wife should have, during her life, the third part of all his lands and tenements, with the said lands which she had in jointure, the said part to be assigned by his executors, and died; the wife refused her jointure, and demanded a third part of the whole land, that is to say, 120l. as a legacy, and 80l. *per annum* as a third part of the residue, for her dower. And it was ordered and decreed in the court of wards, that she should have her legacy, *scil.* the third part of the whole; by which it appears, that the refusal of the wife should have relation *ab initio* to make the husband sole seised of the whole, or otherwise the said devise could not extend to that whereof she was before jointly seised. And so in the case at bar, the refusal of the wife hath such relation and operation in law, that now on the matter the husband was *ab initio* sole seised of the manor of Hynton, and by consequence the same doth descend after the death of the husband; and so the devise of the whole manor of Thoby good and effectual in law; for now it is tantamount as if the use had been limited only to William, and to his heirs on the body of Elizabeth begotten; and where the statute of 34 H. 8. speaks of

(a) Br. Lease 11.
3. Br. Baron
and Feme 4, 48.
Br. Agreem. 6.
Fitz. Waste 36.
Br. Waste 120.
(b) Antea 27. a.
Dyer 61. pl. 31.
Postea 28. b.

a descent *immediately after the decease*, &c. that is true, for now upon the matter the manor of Hynton descended immediately; for now the impediment, that is to say, the estate of the wife, is removed *ab initio*; and yet it was said, that this word (*immediately*) should not have such a strict construction, that it ought to be made *in ipso articulo temporis*, but would be satisfied if it be made in convenient time: as in 18 E. 4. 22. a man is bound to make an obligation immediately, yet he shall have convenient time to make it: but it was answered and resolved, that the said refusal in the case at bar, should not have such relation or operation in law, that the devise should be good for the whole manor of Thoby, and that for two general causes:

1. Upon the reason of the common law, and 2. upon the statutes of 32 & 34 H. 8. As to the first it was resolved, that relation is a fiction of law, (not) to make a nullity of a thing *ab initio*, (to a certain intent) which *in rei veritate* had essence, and the rather for necessity, *ut res magis valeat quam pereat*: and therefore in the said case of dower in (a) 11 E. 3. to this intent, that the wife should have dower, which it is not possible for her to have, unless her refusal should have relation *ab initio*; for this cause, and for necessity, the law will make a nullity of it; but as to any other collateral intent, the law will not make any nullity thereof; as if a man makes a gift in tail to husband and wife, and afterward grants the reversion of the lands and tenements which the husband and wife hold in tail, and afterwards the husband dies, and the wife to have her dower, waves and disagrees to the estate-tail; now, as to her, there is a nullity of the estate *ab initio*; and to such intent the law feigns that the estate was made only to the husband; but as to the grant of the reversion, which is a collateral act, the refusal shall not have any such relation, for she may be endowed although that act stand, and so no necessity; and therefore, without necessity, *ut res magis valeat*, the law will not feign any nullity; but in destruction of a lawful estate vested, the law will never make any fiction. So in the case at bar, for the manor of Hynton only, the law will make such a fiction; but for the manor of Thoby, which is a collateral thing, no such fiction shall be made; for (b) *relatio est fictio juris, & est intenta ad unum*, and that was the first reason. And as to (c) Whorewood's case, it was said, that the decree was made by agreement, as it appears by the said case; and the scope of the case was, that she would have the third part as a legacy, and her dower also; and, by agreement, she took composition for the whole: and it doth not appear by the said case, whether the wife were joint purchaser for life, in tail, or in fee, nor whether any part of the land were held *in capite*, or by knights service.

The

Finch's Law,
66.

(a) Antea 27. b.
3 Leon. 272.
Perk. 29. sect.
352.

(b) Godb. 317.

(c) Antea 27. a.
28. a.
Dyer 61. pl. 31.

The second reason was, that relations in many cases shall help acts in law, as in the case of (a) Dower, &c. but shall never help acts of the parties; that is to say, to make void acts of the parties good, by relation, or fiction of law; and therefore if a man enfeoffs an infant, or a feme covert, and afterwards gives or grants or devises the land, or any other thing out of the land to another, and afterwards the infant or the husband disagrees, that without question shall have relation between the parties *ab initio*, to this intent, that the infant or husband shall not be charged in damages, or receive any prejudice; but as to the void grant or devise of the party, it shall never make the void grant, gift, or devise, good. Also if one demises land to one by deed for life, the remainder to the King in fee, and the King grants the remainder over in fee, and afterwards the deed is enrolled; in this case the (b) enrolment shall have relation for necessity, and *ut res magis valeat*, that the remainder *quasi ab initio* shall pass by fiction of law; for otherwise it would never pass; and therefore, to this intent only, it shall have relation: but to make the patent (which was void at the time of the grant) good, it shall have no relation. So if a disseisor makes a feoffment in fee by deed to A. and B. and makes livery to A. in the name of both, and afterwards A. dies, in this case B. to discharge himself of damages, may refuse it, as hath been said, and it shall have relation *ab initio* as to discharge him of damages; but to make any lease, gift, or grant, or devise, or any other act of the party good, it shall not have relation.

And it was said, that as relations shall extend only to the same thing, and to one and the same intent, so they shall extend only between the same parties, and shall never be strained to the prejudice of a (c) third person who is not party, or privy to the said act. And therefore if a man makes a feoffment of a manor by deed, or (d) without deed, and long time after the livery the tenants attorn to the feoffee, in this case the attornment for necessity, and *ut res magis valeat*, shall have relation by fiction of law to pass *ab initio*, for otherwise they can never pass. And if they should not pass (e) *ab initio* by a fiction of law, they would not be parcel of the manor according to the intent and purpose of the feoffment, if they should pass at several times: but yet this relation shall not (f) charge the tenants for the arrearages in the mean time: so if feoffee upon condition, grants a rent-charge out of the land, and afterwards the grantee brings a writ of annuity, now *ab initio* it was an annuity between the grantor and grantee; but as to the feoffor, who by the grant was entitled to enter for the condition broken, it shall not have

(a) Co. Lit.
150. a.
9 Co. 135. b.
5 E. 2. Avowry
206.

(b) Fitz. Feoff-
ments and
Fairs 30.
Plowd. 31. b;
1 H. 7. 31. a.
Hob. 222.
Moor 676.
Godb. 218.
2 And. 161.
4 Co. 72.
Br. Prærogative
57. 2 Rolle's
399. 400.
Cr. Jac. 52, 53;
409.
Skin. 74, 74.

5 Co. 12.
(c) Co. Lit.
150. a. 310. b.
322, 323.
Cr. Car. 423.
(d) 2 Rolle's 11.
20 H. 6. 7. a.

(e) Co. Lit.
310. b. 202. b.

(f) Co. Lit.
310. b. 221. b.
222. a.
13 E. 4. 4. a.
18 E. 4. 9. b.
vet Nat. br. 117,
118. contra.

(a) Fitz. Age
58. 1 Rolle's
143, 144, 145.
9 Co. 85. a.

have any relation to his prejudice. So it is adjudged in (a) 30 E. 3. 17. in a *dum fuit infra ætatem* against Richard Spellow, the tenant said, that his father was seised, and died seised, and prayed his age; the demandant counter-pleaded the age, because his father and he himself were jointly enfeoffed, and to the heirs of the father: and it was adjudged, that he should not have his age; for although this refusal should have relation as to himself, yet, as to the demandant, who is a stranger, it should not have relation to delay his action, when in truth he had the freehold by purchase. Further, it was said, that no relation shall make that tortious which was lawful; for, as it hath been said, relations are fictions in law, which will never do wrong: upon all which matter it was concluded, that this refusal should have relation only as to the manor of Hynton, and not as to the manor of Thoby, and to the intent only that the wife should not be prejudiced for any thing concerning the manor of Hynton; and this relation doth not prejudice the heir, who is a third person, upon whom, by the death of the deviser, part of the manor of Thoby did descend; and it will not devert that which the law by descent had lawfully vested by the death of the deviser in the manor of Thoby: but as the will took effect at the time of his death, it shall remain; for

(b) Postea 34. a.
4 Co. 61. b.
6 Co. 76. a.
Postea 32. a.

(b) *omne testamentum morte consummatum est*; and the refusal of the wife, as to the manor of Hynton, cannot make the devise as to the third part of the manor of Thoby good, which was void when the devise took effect, *scil.* at the time of the death of the deviser.

Note, reader, not only in this case of relation, which is a fiction of law, but also in all other fictions of law, they are to certain respects and purposes, and extend only to certain persons. As the law supposes, that the vouchee is tenant of the land, whereas in truth he is not, but that is as to the demandant himself, and to enable him to do all things as to the demandant, and which the demandant may do to him; and therefore a fine levied by the vouchee to the demandant, or a fine or release from the demandant to the (c) vouchee, is good; but a fine levied by the vouchee to a stranger, or a release made to him by a stranger is void, and therewith agrees 7 E. 4. 13. b. so if the tenant, hanging a *præcipe* against him, makes a feoffment as to the demandant, the law doth suppose him tenant of the land, and he shall plead all pleas which the tenant of the land may plead; but *in rei veritate* the feoffee is tenant of the land as to all strangers: so if (d) donee in tail makes a feoffment in fee, *in rei veritate* the donee hath *neque jus in re, neque jus ad rem*, and yet the donor may extinguish or diminish his rent by release or confirmation made to him; as it is agreed 14 H. 4. 38. a. b. 1 H. 5. Grants 43. in

(c) Hob. 222.
1 Co. 87. b.
8 Co. 151. b.
Lit. sect. 455,
491.
10 Co. 48. b.
Co. Lit. 265. b.
9 H. 7. 26. a.
7 E. 4. 13. b.
2 Rolle's Rep.
323.
(d) Co. Lit.
269. a. 270. a.
Hob. 337.
2 Rolle's Rep.
322, 417, 429.
Godb. 313, 314.
10 Co. 48. b.
1 Jones 73.

in all which cases, and other the like, the law will never make any fiction, but for necessity, and in avoidance of a mischief; for if the vouchee should not be tenant as to the demandant, or that the tenant after the feoffment should not be, as to the demandant, tenant of the land, the demandant in the one case and the other could never have the effect of his suit, but would be for ever delayed; and in the latter case, notwithstanding the feoffment, the donee shall remain tenant as to him, and of necessity he shall (a) avow for his rent upon him, for he cannot avow upon the discontinuee, for then upon his own shewing, the reversion, to which the rent is incident, would be devested out of him by the feoffment, and by consequence he cannot maintain his avowry for the rent; and therefore for necessity he shall avow upon the donee; and his feoffment, which is his own act, and by which wrong is done, shall not avail him to bar the donor of his rent, for a man shall never take benefit of his own wrong, and that is (as to this point) as it seems to me the better opinion of the books. As to the statutes of 32 & 34 H. 8. it was resolved, that after the statute of 27 H. 8. and before the statute of 32 H. 8. the manor of Thoby was not deviseable; and because the said Will. Barners the devisor had not followed the power and authority (which the statute of 32 H. 8. and the statute of 34 H. 8. which explains it) gave him, it was resolved, that the will was void for part of the manor of Thoby. And that was collected on four parts of the said acts, the effect of which I have abridged as follows.

The first branch of the act of 34 H. 8.

" 1. That all and every person, having a sole estate in fee-simple of any manors holden in chief, &c. shall have full and free liberty, power and authority, to give or dispose, by his last will in writing, as much as in him of right, as much of, &c. as shall amount to the full and clear yearly value of two parts in three parts to be divided.

The first
Branch of the
Act 34 H. 8.

The second branch.

" 2. The same division to be set out by the devisor, owner, or in default thereof, by commission to be granted out of the Court of Wards.

The second
Branch.

The third branch.

" 3. And that the King shall take for his full third part, such manors, &c. of estate of inheritance, as well in fee-tail as in fee simple, as shall descend, or come by descent, &c. immediately after the death of such devisor.

The third
Branch.

The fourth branch.

" 4. And in case the manors, &c. which shall immediately after his death descend, &c. shall not extend to the value of a full 3d part, the King may take, &c. to make up, &c.

The fourth
Branch.

And on these four parts it was concluded for divers notable reasons,

(a) Hob. 337.
Co. Lit. 269. a.
Cro. Car. 428,
430. Plow. 561.
a. 48 E. 3. 8. b.

Co. Lit. 76. a.
b. 78. a.

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reasons, that the devisor had not power to devise the whole manor of Thoby by force of the said statutes: and to this purpose four reasons were collected on the said first branch.

7.
Rep. Q. A. 106.
122, 123, &c.

First, on this word (having); and therefore if it be asked, *quis potest legare?* the makers of the act answer, every person having manors, &c. so that it is not said every person generally, but every person having, &c. And this word (having) imports two things, *scil.* ownership, and time of ownership, for he ought to have the land at the time of the making of his will, and the statute gives such person having, &c. authority to devise two parts of his lands which he hath, and more he cannot devise, for his authority doth not extend to more: and in our case the devisor had not the manor of Hynton, for he and his wife were joint-tenants of it during the coverture, between whom are no moieties: so that he and his wife had it, but he himself had it not; and he is not owner thereof, nor is it to be accounted any of his lands: and every devisor ought to be a person having, &c. at the time of the making his will within the purview of this act. This appears 4 & 5 Phil. & M. Dyer 158. A man (a) seised in fee of land of socage tenure assured it to his wife in jointure, *anno* 32 H. 8. and eight years after, in 2 E. 6. he purchased lands in fee, held *in capite*, in knight's service, and of two parts thereof made his will, and died, his heir within age; and it was resolved, that the Queen should not have any part of the jointure of the wife, and that by force of these words in the act of explanation of 34 H. 8. and having no lands holden by knight's service, because he was not a person having any lands held of the K. by knight's service *in capite*, at the time of the jointure made. It was resolved on the same reason, in the Court of Wards, and in Trinit. 29 Eliz. (b) Carre's case was resolved by the Chief Justices Wray and Anderson, on conference with divers other Justices, and the case was such: King E. 6. by his letters patent, granted the manor of Congressbury to G. Owen, in fee-farm, to hold of the manor of East Greenwich in socage; and rendering the annual rent of 95l. *per ann.* And afterwards Queen Mary, in the first year of her reign, granted divers manors, which came to the crown by the attainder of Margaret Countess of Salisbury, and also 54l. *per ann.* parcel of the said rent of 95l. to Francis Earl of Huntington, and Katharine his wife, and to the heirs males of the body of the said Katharine, the remainder to Winifred Hastings, in tail, to hold in socage; the reversion of the fee being in the crown: and afterwards King Philip and Queen Mary reciting the said grant made by the same Queen, as to the said rent, granted the reversion of the said rent to the said Earl of Huntington and Katharine his wife, and to the heirs

(a) 10 Co. 83.
b. Dyer 158.
pl. 33. 6 Co.
76. a. 2 Brownl.
105. Co. Lit.
78. a.

Carre's Case.
(b) 3 Leon. 276.
2 Rol. Rep. 361.
Godb. 309, 425.
416. 2 Brownl.
105.

heirs of the said Katharine, to hold in chief by the 20th part of a knight's fee; and afterwards G. Owen being seised of the the manor of Congressbury, purchased the said rent of 54 l. *per ann.* by which it was extinct; and afterwards G. Owen died seised of the said manor, and it descended to Richard his son in fee, who by his will in writing devised it to divers persons for payment of his debts, and died, his heir of full age; and although the said rent was extinct between the parties, yet it was said that in consideration of law, it was in being as to the King, for the benefit of his tenure: as in 26 Aff. there the King was seised of the honour of (a) Pikering, and granted the bailiwick thereof in fee, rendering rent, and afterwards granted the honour over to another, and afterwards the baili forfeited his office of bailiwick, whereof the patentee took advantage, whereby it was utterly void: but as to the King for the preservation of the rent, it had continuance: 11 H. 7. (b) a mesnalty descends to the tenant paravail; and although it be extinct, yet the lord paramount shall have the ward. 31 E. 3. (c) tit. Affets, a rent extinct shall be affets, 10 E. 3. Mortmain 17. 38 Aff. 17. (d) F. N. B. 223. A rent extinct by release to an Abbot, is mortmain; yet it was resolved, and so decreed, that the devise was good for all the land in respect of this word (*having*); for Richard Owen was not a person having the rent at the time of the making of his will, but he was a person having the manor, and therefore he might devise it; and forasmuch as it was held in socage, the devise was good *in toto*; and that was the reason of the Lord Dyer in Bret's case, Plow. (e) Com. That the devise there in the principal case, was not good, because the devisor had not the land at the time of the devise, and grounded his reason on this word (*having*.) And Wray Chief Justice, in his argument (which was the last argum. that ever he made) held that this word (*having*) imports, that the devisor ought to have the land, either at the time of the making of his will, or at the publication thereof, which amounts in law to a making.

And that the statute of 34 H. 8. which is but an act of (f) explanation of the act of 32 H. 8. should not be construed by any strained sense against the letter of the act; for if any exposition should be made against the direct letter of the exposition made by parliament, there would be no end of expounding; and therefore he said he had not seen any case adjudged, that the act of 34 hath been interpreted against the (g) letter by other construction than the makers of the act have made; and therefore he said, that if a man (h) hath lands held *in capite* of the yearly value of 20 l. and land in socage of the yearly value of 10 l. that

Co. Lit. 374.

(a) 26 Aff. 60.
6 Co. 79. a.
Moor 161. Br.
Incidents 11.
Br. Patents 35.

(b) 11 H. 7. 12.
2. 6 Co. 79. a.
Br. Descent 67.
Br. Gard. 123.
(c) 31 Ed. 3.
Affets 5. Co.
Lit. 374. b.
(d) F. N. B. 223.
J. 7 Co. 38. a.

Vide infra.

(e) Plow. 344. b.
Rep. Q. A. 122,
123, &c.

Rep. Q. A. 106

(f) 8 Co. 163. b.
Cr. Car. 34. b.

(g) Post. 34. b.
10 Co. 83. a.

(h) Dy. 366. pl.
38. 1 Kcb. 97.

that he may devise all the land held *in capite*, for that is within the express words of the act, and therefore he denied the opinion of the Justices of the Common Pleas conceived *ex improviso*, in 21 Eliz. (a) Dyer 366.

(a) Dyer 366.
pl. 38.
1 Keb. 97.

Note reader, the reason of such opinion (as I conceive) was because if the devise should be good for all the land held *in capite*, the King, as it seems *prima facie*, would in such case have neither wardship, nor primer seisin, because the heir had not any land held *in capite*, whereof he could sue livery, for only the land in socage descended to him. And therefore the Judges there said, that if the devise should be good for all the land held *in capite*, the statutes of 32 & 34 H. 8. would be frustrated and defrauded. But as I conceive, the opinion of (b) Wray, Chief Justice, is good law; for although the devise be good for all the lands held *in capite*, yet the Queen shall have wardship or primer seisin, as the case requires, by force of the savings of the said acts: for if in such cases the tenant by act executed had conveyed all the land held *in capite*, to the use of his wife, or for the preferment of any of his children, or for payment of his debts, in this case the heir shall sue livery for one acre of land held *in capite* and yet none of the land held *in capite* descended to the heir: and so it was resolved and decreed in the court of Wards, in (c) Calthrop's case, 20 Eliz.

(b) 10 Co. 80,
83. a.

(c) Swinb. 28.

(d) 4 Co. 4. 2.
5 Co. 68. 2.
Plow. 343. b.
Jenk. Cent. 115.
Allen 54.

Skin. 72.

And he said, that two things are requisite to the perfection of a will by which land shall pass; that is to say, (d) the writing, and that is *initium*; and the death of the deviser, that is *finis vel consummatio*; he said, that the *initium* ought to be *plenum & perfectum*, or otherwise it is worth nought: and therefore if one commands another to make his will, and thereby to devise W. acre to J. S. and his heirs, and B. acre to J. N. and his heirs, and he writes the devise to J. S. in the life of the deviser, and before the other is written, the deviser dies, yet it is a good will to J. S. But if he commands one to make his will, and to devise W. acre to J. S. and his heirs, upon condition, and he writes the devise to J. S. and his heirs, and before he writes the condition, the deviser dies; this devise is void; for in the one case the devises are several and distinct, and in such case the devise to J. S. is full and perfect; but in the latter case the devise is not full, but maimed and imperfect, for the whole devise as to J. S. was not fully put in writing, and so *initium* in such case *non fuit plenum*.

So it was resolved in the case at bar, that neither the beginning nor the end of the will was full or perfect; for at the time of the writing of it, and at the time of the death of the deviser, he had not power in respect of the joint estate in Hynton to dispose of the manor of Thoby, which

which amounted to the value of two parts of the whole, (a) *Et omne testamentum morte consummatum est*; and because by the death of the devisor Hynton survived to the wife, part of Thoby presently by the death of the devisor descended to the heir; and as the devise in this case took effect by the death of the devisor, so it shall continue.

The second reason out of the first branch was on the word (*sole*); for the testator ought to have a sole estate, as well in the land which he leaves to descend to the heir, as in the land which he devises: but in the case at bar, the devisor neither at the time of the making of his will, nor at the time of his death, had any sole estate in the manor of Hynton, which he did intend should descend to his heir, but he had a joint estate in tail with his wife, and the wife had not any power to disagree during the coverture; but her time of disagreement came after the death of her husband, as it is held 19 Eliz. Dyer (b) 358. so that without question the devisor had not a sole estate in the manor of Hynton, neither at the time of making of his will, nor at the time of his death; and therefore the devisor had power by the act, to devise but two parts of the residue, that is to say, whereof he was sole seised, either at the time of the making of his will, or at least of his death.

The third reason on the first branch was upon these words “(shall have full and free liberty, power and authority, by will, to devise or dispose of two parts of the said manors;”) by which words it appears, that the intent of the makers of the act was, to give liberty and authority to the party (who peradventure had not time to make disposition by act executed in his life) to devise it by his will: but without question, that which he (c) cannot dispose of by any act in his life, shall not be taken for any of his manors, &c. whereof he may devise two parts by authority given him by this statute: but here in our case, the devisor by reason of his undivided estate with his wife, cannot make any disposition of the manor of Hynton, but only during the coverture.

The fourth reason on the first branch, on consideration of both statutes, the devisor had liberty to devise two parts of the clear yearly value, and the third part of the clear yearly value is saved to the K. &c. In which it was noted, that the words as to two parts, and as to the third part, are all one as to the clear yearly value; so that it appears fully by the letter and intention of the act, that the King should have equal and equal benefit for his third part, as the devisee should have for his two parts; yea, the statute adds more special words for the value of the third part, than for the two parts; for he shall

(a) Antea 29.
b. Postea 34. a.
4 Co. 61. b.
6 Co. 76. a.

(b) Dyer 358.
pl. 49. Co. Lit.
36. b. 1 Leon.
285.

(c) 1 Co. 85. b.

shall have the clear yearly value of the third part, without any diminution, &c. or subtraction of the third part of the full, &c. profits thereof, as the words of 32 H. 8. are. But in our case, the King will not have equal benefit; yea, the King will be in a worse case, for the devisee will have his two parts absolutely, and the King will have but a possibility for his third part, and that will depend upon the will of the wife, whose will and pleasure is not restrained to any time, so that against the express letter and intent of the acts, and against all reason, the devisee will have two parts presently of the clear yearly value, and the King will not have the possession of Hynton, but will have a possibility to have it, if the wife will disagree, and that would be an injurious and unequal construction; for Cato saith, (a) *ipse etenim leges cupiunt ut jure regantur*; and this very statute hath been so construed, that equity and equality shall be observed, and inequality avoided, 35 H. 8. tit. Testaments, Br. 19. If (b) a man holds three manors of three several lords by knight's service, he cannot devise two manors leaving the third, for that would not be equal to the two other lords, but two parts of each manor. And on these words (*clear yearly value*) it was said, that that of inheritances which are not of any annual value, some are deviseable, and some are not devisable within this statute.

(a) 2 Co. 25. b.
5 Co. 100. a.
8 Co. 152. a.
9 Co. 123. b.
Co. Lit. 10. a.
143. a. 116. b.
174. b. 271. b.
(b) 9 Co. 133. b.
2 Co. 25. b.
5 Co. 100. a.
2 Bulst. 15. Br.
N. C. 275.

(c) 10 Co. 81. a.
Co. Lit. 111. a.

And therefore, if the Queen grants to one and his heirs (c) *bona & catalla felonum & fugitivorum, or utlagatorum, fines, amerciamenta, &c.* within such a town or manor, in this case he cannot devise them to another, nor leave them to descend for a third part, because they are not of any annual value, and therefore the said statutes do not extend to them.

But if a man be seised of a manor to which a leet, or waif and stray, or any other hereditament which is not of any annual value, is appendant or appurtenant, there by the devise of the manor, with the appurtenances, these shall pass as incidents to the manor, for inasmuch as the statute enables him by express words to devise the manor, by consequence it enables him to devise the manor, with all incidents and appurtenances to it: and it was never the intent or meaning of the Parliament, that when the deviser had power to devise the principal, that he should not have power to devise that which was incident and appendant to it, or that the manor, &c. should be dismembered, and fractions made of things which by lawful prescription have been united and annexed together. And it was said, that all this was resolved by Anderson Chief Justice of the Common Pleas, and Periam, then one of the Justices of the same court, on a conference had with divers other Justices, *Pasch. 25 Eliz.* in Baker's case, concerning

ing divers franchises and liberties within the manor of Canford, which report was made to the Lords of the Council, in the said term, after dinner, in the Star-chamber. And with their resolution agrees the opinion of (a) Prisot in 32 H. 8. 22. in the like case: it is enacted by the statute of (b) 1 H. 4. cap. 6. that those who ask of the King lands or tenements, offices, &c. make express mention of the value of them: but Prisot there held, that if the office be of a certain value, there he ought to make mention of the value; but if it be of a casual thing, there he need not; as if the King grants me a market, I need not to set the value thereof, because it is not yearly certain; so when the law requires that the value be mentioned, it is to be intended of a thing which is of a certain yearly value: but if a man hath a hundred, with the goods of felons, outlaws, fines, amerciaments, return of writs, and such like casual hereditaments within the hundred, and such hundred, with the said casual hereditaments, have been accustomedly let to farm for a yearly rent, then it may be devised within the purview of the said acts, because the uncertainty hath been reduced to an annual value, according to the purview of the said acts; on which differences it was concluded, that the third part of the clear yearly value ought to be left to the heir, and not any thing which depends on an uncertainty. For if the franchise to have the goods and chattles of felons or persons outlawed, which were never demised for a certain rent, are left to the heir for his third part, in that the statute is not pursued, and yet it may be they may happen every year; *a fortiori* in the case at bar; as to the manor of Hynton, it depends on an uncertainty, for it may be the wife will refuse, and it may be she will not refuse, and no time is limited when she shall refuse, and therefore the statute is not pursued by reason of the uncertainty.

Also it was said, that if a man is seised of 3 acres, each of the yearly value of 12d. and he devises a rent of 3s out of all the three acres, this devise is void for the whole, and shall not be good for two parts, because he hath not pursued the statute of 34 H. 8. by which it is enacted, "That he may devise any rent, common, or other profit, out of the same two parts, viz. of his manors, lands, tenements, and hereditaments, or out of any part thereof, as much thereof as shall amount in the clear yearly value of two parts thereof." So when he devises a rent out of the whole, he doth not pursue the power and authority which the statute prescribes, but in such case, if he devises a rent of 3s. which is to the value of the whole, out of two parts, it is good, for in this branch the value extends to the land, and not to the rent, for the words are, "any rent," without any restraint. And it

(a) 32 H. 6. 22. a.
10 Co. 81. a.
(b) 10 Co. 81. a.
Co. Lit. 133. a.
Rastal Patent 4.

5 Co. 6. a.

Hob. 80. Co.
Lit. 111. 8 Co.
85. a.

8 Co. 84. a. 85. a.

(a) N. Benl. 49.
 ri. 88. 8 Co.
 85. a. Dyer 150.
 pl. 86. 1 Leon.
 76. 3 Leon. 29.
 1 And. 3. 4.
 Jenk. Cent. 215.

was observed on the statute of 32 H. 8. That if a man had devised all his land, it had been good for a third part, as it was adjudged in (a) Hunton and Hyde's case, Dyer 150. because the land was severable, and might be divided either by the devisor during his life, or by commission after his death. But a rent devised out of land is an entire thing, and power to devise it is given only by the statute of 34 H. 8. for the act of 32 H. 8. doth not extend to it; and therefore when the statute enables him to devise a rent out of two parts, if he devises it out of the whole, he doth not pursue the statute: and so it was concluded on the first branch, that the devisor in the case at bar, at the time of the making his will, was not a person "having," and "having sole estate," and who had power and authority to dispose two parts of the same lands of "clearly yearly value," and that the King, &c. should have the third part of the "clear yearly value," without any diminution, &c. but as to the manor of Hynton, he was jointly seised with his wife, as is before said.

Their reason on the second branch was, that the devisor, by any thing in his life, could not assign the manor of Hynton for the third part, nor could it after his death, by commission, be assigned for the third part; for during all the coverture, the wife was jointly seised with him, and after his death it survived to his wife; and the words of the act are, "the same division to be set out by the devisor or owner, &c. and in default thereof by commission;" in which branch this word (owner) is also to be observed, which is added, to shew that every devisor ought to be "owner," and he who shall make any division of the three parts, &c. ought to be "owner," which he is not in our case of the manor of Hynton, and therefore he cannot assign it to the King for his third part.

Their reason upon the third and fourth branches, was on this word (immediately) which for the enforcing of the intent of the makers of the act, is twice inserted. And by the words of the of the third branch it is enacted, that the third part ought (in two several clauses) immediately to descend after the death of the devisor or owner; immediately is as much as to say, without any mean time: but in our case the manor of Hynton survived to the wife, and till disagreement, nothing thereof did descend, &c. *Ergo*, it did not descend immediately. And herein the judgment of the law on this will, and of the estate of these manors and lands after the death of the devisor, and before the disagreement is to be considered; and without question in the mean time, the manor of Hynton survived to the wife, and therefore of necessity in the mean time, a part of the manor of Thoby shall descend, for if before this disagreement an office had been found of all this matter, without question, the Queen would have had part of the manor of Thoby, &c. then

then forasmuch as every devise ought to take effect by the death of the deviser, as it is held in 9 H. 6. and many other books, because (a) *omne testamentum morte consummatum est*, for this cause the devise being void at the time of the death, for part of Thoby, and lawfully vested in the heir by descent, it cannot be made good and divested out of the heir by the subsequent disagreement of the wife: but this word (immediately) makes it clear, for add it to the words precedent, viz. that the King shall have a third part of the clear yearly value, immediately after the death of the deviser or owner, all these words, and principally this word (immediately) directly prove that the King ought to have the third part presently by the death, and shall not stay or expect on any uncertainty, as in our case he shall do, if he shall expect it on the refusal of the wife, for peradventure she will not refuse in a year, peradventure two years, &c. Littleton saith, if a woman (b) disseisorefs takes a husband, and hath issue and dies, and afterwards the tenant by the courtesy dies, this dying seised shall not toll an entry, for the issue came not to his lands immediately after the death of his mother.

(a) Antea 29. b.
37. a. 4 Co. 61. b.
6 Co. 76. a.

(b) Co. Lit.
241. b. Co. Lit.
sect. 394. 37 H.
6. 1.

And it was agreed, that if a man be seised of three acres by knight's service *in capite*, and makes a lease of one acre for life, and afterwards devises the other two acres, and dies, and afterwards tenant for life dies, yet the devise is void for the third part of the two acres, because the third acre did not descend immediately after the death of the deviser to the heir, as the statute saith; that is to say, "by descent, immediately after the death of the deviser." In 17 El. Dyer, the Earl of (c) Arundel's case, where a gift in tail was made on condition, that if the donee, or his issues, *aliquam rem facerent*, &c. *quo minus prædict' maner' præfato comiti & hæredibus suis*, &c. *immediate reverti debeat*, &c. In that case they held clearly, that if the donee do any act by which, when he dies without issue, the donor shall be put to suit, or to entry, so that he manor doth not immediately revert, *hoc est*, without any, mean time, &c. that the donor may re-enter: and as to the case in 18 E. 4. that was affirmed for good law, when a (d) man is to do an act immediately after an award, in that case, inasmuch as the party is bound to do an act of necessity; he ought to have such time for the doing thereof, as the doing of the act requires, and therefore there of necessity, there ought to be a mean time between the award and the performance of the act; but here in the case at bar, immediately by the death of the deviser, land without any mean time may descend, and that was the intent of the makers of the act: for as the devisee shall have the two parts (e) immediately, so the heir shall have

(c) 10 Co. 37. a.
40. a. Dyer.
342, 343. pl.
55, 56. 6 Co.
41. Jenk. Cent.
242.

(d) Antea 28. b.
18. E. 4. 22. b.
23.
Br. Arbitrement
51.

(e) Co. Lit. 111.
b.

his third part immediately, 8 E. 4. 71. and 21 E. 3. 27. it appears that he who is immediate heir, excludes all mean heirs; the same law of an immediate tenant.

(a) Antea 31. a.

And against the opinion of (a) Wray, Ch. Justice, it was afterwards objected in the Excheq. Chamber, that the statute of 34 H. 8. hath been construed by equity, against the letter of it. And to that purpose a case, Trin. 26 Eliz. in the Com.

(b) Co. Ent. 663.
nu. 13. 2 Brownl.
104. 1 And. 146.
Mo. 148.
3 Leon. 105.

Pleas, Rot. 1916. between (b) Ive and Stacie was cited; the effect of which case was, that a man seised of lands, part held *in capite*, and part in socage, made a feoffment of the lands held *in capite*, to the use of himself and his wife for life, with divers remaind. over, and afterwards (the said lands *in capite*, being full two parts) devised the socage land: it was adjudged that the devise was void; and yet it was said, it is against the letter of the act. To which it was answered and resolved, that the reason of the said case was, because it appears by the words of the said act, that the stat. gives authority to one to make disposition, either by act executed, or by his will, of two parts, so that if he hath executed his authority by act executed of two parts to the use of his wife, he hath no (c) authority by the stat. to make any devise of the third part, for by the conveyance in his life, he hath executed his power and authority which the statute gave him, and therefore he cannot make any devise of the residue, which as applied to prove that he ought to pursue the authority which the statute gave him, &c.

(c) Cr. El. 878.
Cr. Jac. 31.
Mo. 567. 6 Co.
18. a. Co. Lit.
111. b.

(d) 10 Co. 84. b.

Another case was cited out of a reading, that the King granted certain lands to one and his heirs (d) during the life of the grantee by knight's service *in capite*, and after his death in socage, in that case he might devise all that land; and yet it was said, it was against the letter of the said act, for at the time of the making of his will and day of his death, he held by knight's service, which case was agreed to be good law. For although the stat. speaks at the beginning generally of lands held by knight's service, yet there is a saving of ward, &c. to the lord; so that it appears fully by the letter of the act, that there ought to be such a tenure by knight's service, whereby the lord shall have ward, &c. or otherwise it is not any tenure within the act: but in the said case the lord was not to have any wardship, because the tenure determined by his death, and the reason of wardship failed, *scil.* that an (e) infant within age cannot do knight's service, as Littleton saith, fol. 22. a. So *e converso*, if land be given to hold in socage during his life, and after his death by knight's service, there shall not be any wardship, because the tenure by knight's service beginneth in the son, and the father during his life held in socage.

(e) Lit. sect.
103. Co. Lit.
74. b. 78. b.
6 Co. 73. b. 74.
a. 2 Inst. 12.
Cr. Jac. 156,
389. 25 E. 3.
47. a.

And another case was cited out of a reading also, *scil.*

A man (a) seised of lands held *in capite*, and of other lands held in socage, devised the land in socage, and afterwards aliened the land held *in capite in bona fide*, this devise is good for all the land holden in socage; which case was also agreed for good law for all the land in socage, when no title of the wardship, &c. doth accrue to the lord in respect of other land. And it was objected, that if the stat. of 34 H. 8. should not be taken by equity, then the stat. might be easily defrauded: for if a man held one acre of land by knight's service *in capite*, and 1000 acres in socage, and is disseised of the acre held in chief, and then makes his will of all the land held in socage, and dies, in that case according to the let. of the act, the devise will be good for all the land in socage: and thereupon they did infer on these words, "every person having a sole estate in fee simple, &c. holden by knight's service in chief," and in that case he had not any land held in chief, either at the time of the making of his will, or at the time of his death but only a right to the land, and so out of the letter of the act, of which he could not make any disposition or devise; and yet if that case should not be taken by equity, the whole act would be to little or no purpose: to which it was answered, that the said case was within the letter of the said act, for the (b) disseisee in the judgment of law hath the land to many purposes.

For first, he hath the land to forfeit, and therefore if he be attainted of treason or felony, he shall forfeit the land.

2. If he dies without heir, the land shall escheat to the lord. 37 H. 6. 1. a. 6 H. 7. 9. a. 32 H. 6. 27. a. 2 H. 4. 13.

3. The disseisee shall compel the lord to (c) avow on him as his very tenant, Lit. Releases 106. b. And Littleton there saith, that the disseisee is tenant in law.

4. If he dies, his heir within age, the lord shall have the wardship; and the lord shall have a writ of right of ward, and the writ shall say, *terram illam tenuit*; and therewith agrees F. N. B. in writ of escheat (d) 144. and (e) Lit. Chap. Releases, 107. a. b. 36 E. 3. Garde 10. And so in judgment in law, the disseisee had the land held *in capite*, so that he cannot devise all his socage land. And as to the case in 4 & 5 Phil. & Mar. Dyer 155. that if lands in (f) London, or lands which are devisable by custom, are held *in capite*, yet the whole may be devised. To that it was answered, that was not by force of the statute, but because the lands were devisable by custom before the statute, and the statute is in the affirmative, and doth not (g) take away any custom: but it was agreed, that in the said case, the saving in the act gave in such case the third part of the King for wardship, &c. and yet the heir should be barred by the custom.

(b) Fitz Escheat
3 Br. Escheat
11, 16, 22.
Gard. 36. Br.
Traverse 133.
Br. Entre Con-
geable 129.

(c) Ante 23. b.
Co. Lit. 268.
Co. Lit. sect.
454 9 Co. 21. a.
(d) F. N. B. 144. c.
(e) Lit. sect. 458.
Co. Lit. 270. a.
(f) 9 Co. 133. b.
Dy. 155. pl. 21.
Dall. in Kelw.
205. b. 206. a.
Dall. in Ash.
pl. 9. Dall. 75.
pl. 60. Styl. 476.
Mo. 70. Dall. 64.
pl. 24. Co. Lit.
111. b. 1 And.
52. 53, 147. Benl.
in Kelw. 214.
Benl. in Ash. 32.
N. Ben. 317.
pl. 100.
(g) Co. Lit. 111
b. 115. a. 2 R.
266. M. 70.

BUTLER and BAKER's Case. Part III.

And after the case had been argued twenty-one times severally, *scil. Pasch.* 37 Eliz. judgment was given according to the said resolutions, against the plaintiff. You have (good reader) many notable rules and cases of relations put in this case, whereby you will the better understand your books which treat of relations, to which I will add one case now lately, *scil. Trin.* 37 Eliz. adjudged in the Common Pleas, in an *ejectione firmæ*, between (a) Jennings and Bragge, where on a special verdict found, the case was shortly thus: a disseisee made an indenture purporting a lease for years, and delivered it to a stranger off of the land, as an escroll, and commanded him to enter on the land, and to deliver it on the land, as his deed, to the lessee, which he did accordingly; it was adjudged it was a good lease. And in that case,

1. This difference was agreed, when the person at the first delivery hath not power or ability in law to make the lease and contract, and before the second delivery he attains to it, there the lease or contract is void: but when the person at the first delivery hath power and ability in law to contract, but cannot perfect it till an impediment be removed; there if the impediment be removed before the second delivery, the contract is good. As if at the time of the first delivery the lessor be an infant, or feme (b) covert, and at the time of his second delivery he is of full age, or sole, in both these cases the deed shall not bind; for at the time of the first delivery he was not a person who had ability in law to make a contract: but in the case at bar, the lessor was able to make a contract, as well in respect of his person, as of his right and interest in the land, but was hindered only by the disseisin, which being removed before the second delivery, the lease is good.

2. It was resolved, that to some intent, the second delivery hath (c) relation to the first delivery, and to some not, and yet in truth, the second delivery hath all its force by the first delivery; and the second is but an execution and consummation of the first: and therefore in case of necessity, & *ut res magis valeat quam pereat*, it shall have relation by fiction to be his deed *ab initio*, by force of the first delivery; and therefore, if at the time of the first delivery, the lessor be a feme sole, and before the second delivery she takes husband; or if before the second delivery she dies, (d) in that case, if the second delivery should not have relation to this intent, to make it the deed of the lessor *ab initio*, but only from the second delivery, the deed in both cases would be (e) void; and therefore in such case for necessity, and *ut res magis valeat*, to this intent by fiction of law, it shall be a deed *ab initio*, and yet in truth it was not

(a) Cr. El. 446,
447. Co. Lit.
48. b. Lane 99.
3 Bulst. 215.
Palm. 498, 499.
Bridgm. 51.
1 Ro. 830.

(b) Cro. Car.
165. Cr. Jac.
617. 2 Leon.
200. Yelv. 1.
1 Benl. 134, 135.
Cr. Car. 388.
2 Sand. 313.

(c) Dyer 57. pl.
23. Cr. El. 447.

(d) Styl. 423.
14 E. 4. 2. b.

(e) Cr. El. 447.

not his deed till the second delivery: but in the case at bar, if it should have relation by fiction of law (a) to the first delivery, then that would avoid the lease, for then it would be made by one who was out of possession, and as one said, (b) *fielto legis inique operatur alicui damnum vel injuriam*; and therefore to this intent it shall not have relation but according to the truth to be a deed from the time of the second delivery, *ut res magis valeat quam pereat*; and hereby it appears, that the reason of the law (that to some intent the second delivery shall have relation, and to other intent no relation) is all one, *scil.* for necessity, and *ut res magis valeat quam pereat*.

3. It was resolved, that as to (c) collateral acts, there shall be no relation at all; for if the obligee do release before the second delivery, such release is void, *vide* 18 H. 6. (9.) 91. & 27 H. 6. 7. a. Note reader, that if in the case of the infant after the second delivery, full age should make the deed good, then it would be in the power of him to whom it was delivered, to make it bind or not at his pleasure: for if he would deliver it during the minority, it would not bind, and if he should deliver it after full age, it should bind; which would be inconvenient that he, who to this purpose was but a servant, should have (d) *ligandi & non ligandi potestatem*.

And touching (e) wills, whereof you have much good matter in the said case of Butler and Baker, my advice to all who have lands, is, that you take care by the advice of learned counsel, by act executed, to make assurances of your lands according to your true intent, in full health and memory; to which assurances you may add such conditions or provisos of revocation as you please. For I find great doubts and controversies daily arise on devises made by last wills; sometimes in respect of tenures of lands, sometimes by pretences of revocations, which may be made easily by word; also in respect of obscure and insensible words, and repugnant sentences, the will being made in haste: and some pretend that the testator, in respect of extreme pain, was not *compos mentis*, and divers other scruples and questions are moved upon wills. But if you please to devise your lands by will,

1. Make it by good advice in your perfect memory, and inform your counsel truly of the estates and tenures of your lands, and by God's grace the resolution of the Judges in this case will be a good direction to learned counsel to make your will according to law, and thereby prevent questions and controversies.

2. It is good, if your will concern inheritance, to make it

(a) Cr. Jac. 431.

(b) Co. Lit. 150. a. 2 Rol. Rep. 502. Ant. fol. 29. b. 11 Co. 51. a. Godb. 317. Palm. 354. 13 Co. 21.

(c) 2 Rol. 419. Perk. 128. 127. Br. Relation. Br. non est Factum 5.

1 Salk. 301.

(d) Hard. 33.

(e) Co. Lit. 111. b. 12 Car. 2. cap. 24. Swinb. 31.

Swinb. 31.

Of Gifts of Goods. Post. 81. a. b.

BUTLER and BAKER's Case. Part III.

indented, and to leave one part with a friend, lest after your death it be suppressed.

3. At the time of the publication of the will, call credible witnesses to subscribe their names to it.

4. If it may be, let all the will be written with one and the same hand, and in one and the same parchment or paper, for fear of alteration, addition or diminution.

5. Let the hand and seal of the devisor be set to it.

6. If it be in several parts, let his hand and seal be put, and the names of the witnesses subscribed to each part.

7. If there be any interlining or rasure in the will, let a memorandum be made of it (and signed by the testator).

8. If you make any revocation of your will, or of any part of it, make it by writing, by good advice, for on a revocation by word, follow controversies, some of the witnesses affirming it to be in one manner, some in another manner.

Hob. 30.

[See the Statutes of Frauds and Perjuries, 29 Car. 2. c. 3. & 3 & 4 W. & M. c. 14, &c.]

RATCLIFF's

RATCLIFF's Case.

Hil. 34 Eliz.

In the King's Bench.

LUKE NORTON brought an *ejectione firmæ* against William Rowland, on a demise made by Edward Ratcliff, 10 December 31 Eliz. of the moiety of a house, four hundred acres of land, forty acres of meadow, one hundred acres of pasture, and forty acres of wood, in Wye and Braborn in county of Kent, &c. And on special pleading of the act of 4 & 5 Phil. & Mar. cap. 8. &c. (a) the issue was, whether Elizabeth Ratcliff, wife of Ralph Ratcliff, had the custody of Martha, wife of the said Edward Ratcliff the lessor, at the time of the contract and marriage between the said Edward and Martha; for if the said Elizabeth then had the custody of the said Martha within the said act, then by the pretence of the defendant, Martha by force of the said act had lost the inheritance of the said lands, and then judgment ought to be given against the plaintiff. And on the said issue the jurors gave a special verdict to this effect: William Wilcocks, Esq. took to wife Eliz. Edolf, daughter and heir apparent of John Edolf, and Alice his wife, which William Wilcocks had issue on the body of the said Elizabeth, John, Elizabeth, and the said Martha: and afterwards, *scil. ultimo Martii* 16 Eliz. Wil. Wilcocks, by his will in writing, devised and appointed the order, custody, education and government of the said John his son, and of the said Eliz. and Martha his daughters, to the said John Edolf and Alice his wife, *aurante vita eorundem Johannis & Aliciæ*, and died. After whose death the said Elizabeth, the relict of the said William Wilcocks, took to husband the said Ralph Ratcliff; and afterwards John Edolf died, and that the said Alice was seised of the said tenements in fee, and held them in socage; and 20 Eliz.

by

(a) Co.Lit.83. b.
Cr. Car. 465.
3 Inst. 62.
Vaugh. 181.

by her will in writing, devised the tenements afores. to the said John Wilcocks in tail, the remainder to the said Elizabeth and Martha, daughters of the said Will. Wilcocks, and to the heirs of their two bodies begotten, by equal portions, equally to be divided; the remainder to the said Eliz. (the mother,) daughter and heir apparent of the said Alice, and to her heirs. And afterwards, *anno* 26 Eliz. the said Alice died, and afterwards the said John Wilcocks, 1 August 28 Eliz. died without issue; and that the said Eliz. daughter of the said Will. Wilcocks, 10 July 28 Eliz. took to husband Will. Androwes, by force whereof the said William and Elizabeth his wife, and the said Martha, did enter into the tenements afores. and were thereof seised accordingly; and afterwards the said Martha, 8 October, 29 Eliz. then dwelling in the house of the said Ralph Ratcliff, at Hitcham in the county of Hertford, with the said Ralph, and Eliz. his wife, and then being above the age of fourteen years, and within the age of sixteen years, with the consent and good-will of the said Ralph Ratcliff, voluntarily and of her good accord, between the 6th and 7th hours of the same day, before noon, departed from the house of the said Ralph Ratcliff, for the space of eight miles, to Bramfield in the said county of Hertford, where at the twelfth hour of the same day, she was espoused and married to the said Edw. Ratcliff; and that the said Edw. Ratcliff entered, and made the lease to the plaintiff, *prout*, &c. But whether upon the whole matter, the said Elizabeth Ratcliff had the custody and governance of the said Martha at the time of the contract and marriage afores. or not, the jurors pray the advice of the court. And it was unanimously agreed by Sir Christopher Wray, Chief Justice, and the whole court, That the said Eliz. had the custody and governance of the said Martha at the time of the said contract and marriage, within the intent and meaning of the said act. And in this case six points were unanimously resolved by the whole court.

3 Inst. 62.

Co. Lit. 88. b.
Lit. sect. 103.

1. That there were two manner of custodies or guardianships, one by the common law, the other by the statute; and also that at the common law there are four manner of guardians, *scil.* guardian in knights service, guardian in socage, guardian in nature, and guardian in nurture. The first two, and the last are fully described in our books: but as to guardian in nature, great controversy was betwixt those who have argued in this case at bar, and all rose through the ill understanding of our books on both sides. For some held that the father only should have the custody of his son and heir apparent within age, and not the mother, nor the grandfather, nor any other ancestor, should have any custody of his heir apparent: also that the father should not have the wardship of his daughter and heir apparent; for

for according to them, it ought to be such an heir as ought to continue heir and sole heir apparent, and that a (a) daughter is not, for a son may be born, and then the daughter is not heir, or another daughter may be born, and then she is not sole heir. As if lands in Borough English be held by knight's service, the father shall not have the custody of his younger son, because he may have a younger son, no more than the (b) younger son can endow his wife of land in Borough English, *ex assensu patris*, for he ought in such case to be heir apparent, who in judgment of law shall continue heir apparent, and not heir apparent who by accident is heir, and by (c) accident may not be heir; and in respect the sole cause which gives the wardship in the one case, and enables the heirs to make the endowment in the other case, is, because he is heir apparent, the same shall be intended in law (which abhors uncertainty) of a certain and perdurable heir apparent: and they relied principally on the words of Littleton (d) in his chapter of knight's service, who speaks only of father and son in such case, and not of a daughter, or any other heir: and on the other side, it was affirmed, that the father should have the wardship not only of his son and his (e) daughter also, as it is agreed 8 E. 2. Trespass 235. 31 E. 1. Garde 154. & F. N. B. 143. o. But also every ancestor, male, or female, should have the wardship of his heir apparent, male or female; and all this, it was said, appears not only by the register of writs, on which (f) foundation (as Just. Fitzher. in his preface to his book called *Natura Brevium* saith) the whole law depends, but also in our books, by the judgments and opinions of the sages and Judges of the law, 32 E. 3. tit. (g) Garde 32. in Trespass, *quare f. (h) consanguineum & hæredem* (the plaintiff) *cujus maritagium ad ipsum pertinet, tali loco rapuit & abduxit contra pacem*. 31 E. 3. Barre 257. And (i) 31 E. 3. Brief 327. The mother, although she had no land, brought a writ of ravishment of ward of J. her eldest son and heir ravished against the grandfather of J. who had land which might descend to J. And it was said, that where it was objected, that the father should not have the wardship of his daughter and heir apparent, because peradventure she might not continue heir, or at least sole heir: the same reason may be objected against the wardship of his eldest son, for peradventure he will not remain heir apparent, for if the father be (k) attained of felony or treason, in such case his son is not his heir apparent, and then the lord of whom the land is held shall have the wardship of the son in the said case that Littleton puts: for then the son is not heir apparent to the father, and therefore the father shall not have the wardship of him, and by consequence the lord shall have it;

for

(a) Moor 738.
2 And. 207.
6 Co. 22. a.

(b) 6 Co. 22. a.
Co. Lit. 35. b.

(c) Cr. Car. 412.

(d) Co. Lit.
Sect. 114.

(e) Co. Lit. 84.
a. 6 Co. 22. a. b.

(f) Co. Lit. 73. b.

(g) Moor 739.
(h) Co. Lit. 84. a.

(i) F. N. B. 143.
g. Moor 738.
2 And. 207.

(k) Co. Lit. 84. b

Co. Lit. 88. b.

(a) Co. Lit. 84.
a. b.

(b) Co. Lit. 84. b.

(c) 32 E. 3.
Gard. 32. Antea
38. a.
(d) Co. Lit. 84. b.
(e) Lit. sect. 114.
Br. Gard. 55. Br.
Ravishment de
gard. 23. Co.
Lit. 84. b. F. N.
B. 144. o.
30 E. 3. 16, 17.

4 & 5 P. & M.
cap. 8.

*Nota, quod bodie
videtur in potes-
tate antecessoris
esse, gubernatio-
nem liberorum dis-
ponere in quibus
manibus placet.
Quære si hoc est
intelligi de puellis
tantum.*

for it appears by Littleton, and all the books, that he ought to be his heir apparent: and the court resolved, that both sides had erred by mistaking the true sense of the books; for it is true, that every ancestor, male or female, shall have trespass, or a writ of (a) ravishment of ward, against any stranger, who of his own wrong ravishes the heir apparent of any person, be the heir male or female, and the writ shall say, *cujus maritagium ad ipsum pertinet*, and the law in that hath great reason; for whereas in truth the whole estate of the ancestor, and the (b) establishing of his inheritance, principally consists in providing of a suitable marriage for his heir apparent, the law therefore gives him a remedy against him who wrongfully deprives him by their tortious ravishment of the means to accomplish it: and therefore it is not material of what age the heir apparent in such case is, as appears by the said book, in (c) 32 E. 3. but such action lieth not against the (d) guardian in chivalry by any ancestor, but only for the father, and for him the action lieth against the lord of whom land is held by knight's service, where his son and heir apparent is ravished by him, as appears by (e) Littleton, and 18 E. 3. 25. 30 E. 3. 17. 29 E. 3. 7 & 19. And the book in 9 E. 4. 53. a. That a woman shall not have a ravishment of ward of her daughter and heir apparent taken and ravished. is to be intended against the guardian in chivalry, and on this difference the said books are well reconciled: but as to the case of the daughter and heir apparent; the court gave no resolution: so in this case, the court resolved that the mother could not be guardian in socage, if the land had descended to the daughter, nor for nurture, because the daughter was above the age of fourteen years; but the common law gave her remedy against every stranger who took and ravished her of his own wrong, as is aforesaid.

2. It was resolved, that in this case the mother had the custody of the said Martha within the provision of the said act; for now the said act hath ordained two sorts of new custodies, *scil.* by reason of nature, and by assignation: by reason of nature the father, and after the death of the father the mother, having the governance of such daughter by assignation made by the father, either by his will, or by any act in his life: and to this purpose three branches of the said act were considered: the first branch doth prohibit the taking of any damsel under the age of sixteen years out of the possession, custody and governance, and against the will of the father, or of such person to whom her fath. by his will, or by any act in his life, shall devise, assign, or give the order, custody, educat. or governance of her

her; which first branch contains only a prohibition; but it is thereby proved, that the father may appoint the custody of any of his daughters under the age of sixteen years, by his will, or by any act in his life, to this purpose only, that he who takes such damsel out of such custody, shall incur the penalty of this act. The second branch doth inflict a punishment by fine and imprisonment, on him who takes such damsel unmarried out of the possession, and against the will of the father and mother, or of such person who then shall have by any lawful means, the order, custody, &c. of such damsel. And it was agreed, that these words (father and mother) should be understood father or mother, after the death of the father which is well expounded by the subsequent clause. The third branch, on which this case depended, imposes the punishment and forfeiture, as well on him who takes such damsel and deflowers her, either against the will, or without the knowledge of the father, if he be alive, or of the mother having the custody of such damsel, contracts matrimony with her; as on the damsel if she exceeds the age of twelve years, if she assents to such contract, by forfeiture of her land during her life: note; this latter branch extends only to the custody of the father and mother having the custody of her, that is to say, if the father had not disposed the custody of her to others; and it extends to him who takes any damsel, although she were not heir, or heir apparent, and although she departs with her own assent after the age of 12 years, for which the common law gave no remedy: and it is to be observed, that the clause, which gives forfeiture to such damsel which consents, refers only to the third branch, and not to the first or second; so that forasmuch as the father in this case on the matter had not disposed of the custody of the daughter, the daughter was in the custody and governance of the mother within the provision of this act; and also she was, at the time of the said taking, heir apparent to the said Elizabeth.

3. It was resolved, that the assent of Ralph Ratcliff the husband was not material, for the statute hath annexed the custody to the person of the mother *jure naturæ*, which is inseparable, and cannot by the marriage be transferred to the husband, but remains after the marriage only in the mother; for as it is agreed in 33 H. 6. 55. b. the father who hath the wardship of his son and heir apparent *jure naturæ*, cannot forfeit it by outlawry, neither shall his executors or administrators have such wardship: and it was said, if there be lord and feme tenant by knight's service, and the tenant makes a lease for life, and afterwards the lord and tenant intermarry and have issue between them

Co. Lit. 84. b.
Br. G. rd. 6. Br.
Forfeiture 70.
7 Co. 12. b.
13. b. Calvin's
Case. 2 Inst.
234.

them a son, and the wife dies, and afterwards the father dies, the son within age, that his executors should not have the wardship by reason of the feignory, for the father has the wardship of the eldest son *jure naturæ*, which is inseparable, and cannot be waved, and he cannot have the wardship of his son by the death of his wife, by reason of his feignory, for that was inseparably vested in him as father presently, by the birth of his son *jure naturæ*: and Littleton (a) saith, that the father during his life shall have the marriage of his son and heir apparent, and not the lord.

4. It was resolved, that although the issue was, whether the said Elizabeth had the custody of the said Martha at the time of the contract; and it appears by the verdict, that she did depart out of the house of the said Elizabeth 6 hours before the contract; yet in judgment of law, the said Elizabeth had the custody of her at the time of the contract, for, as hath been said, this custody is inseparably annexed to the person of the mother.

5. It was resolved, that in this case Martha and Elizabeth were tenants in common in tail, the reversion to Elizabeth the mother and her heirs: for these words in a will, (b) (equally to be divided) make a tenancy in common, according to the intent of the deviser, although they never make any partition in fact, for his intent appears, that it shall be divided, and by consequence, that there shall be no survivor, and so hath it divers times been adjudged before this time.

6. It was resolved, that on this verdict it appears, that Edward Ratcliff and Martha his wife had a good title to the land against Androwes and Elizabeth his wife; and that one daughter as this case is, should not take benefit of the forfeiture of the other. For the statute gives the forfeiture "to the next of kin, to whom the inheritance should descend, or come after her decease, &c. during the life of such person that so shall contract matrimony." So that first, he ought to be of blood, and, 2d. he ought to be next of blood to whom the inheritance should descend or come, &c. And although Eliz. the daughter be of blood, yet in this case by the death of Mar. the land, if she hath issue, shall descend to her issue, and if she hath no issue, it shall revert to Eliz. the mother, (c) 5 E. 4. 5. Affise 27. in the like case on the statute of (d) 6 R. 2. agrees with this resolution. Then it was moved, if the mother in this case should enter for the forfeiture; and it was objected, that she could not enter, for she is not of the blood of the daughter, for the daughter derives her blood from her mother, and not the mother from her. And therewith agrees (e) 5 E. 6. Administration Br. 47. where it is held, that the father or mother are not next of blood, to whom administration of the goods of their son or daughter shall

(a) Lit. sect.
114. Co. Lit.
84. a.
(b) Lit. Rep.
47. Moor. 594.
558, 667.
Goldsb. 182,
88, 183. Cr. El.
729. 1 Brownl.
82. Yelv. 23.
24. Owen 127.
1 Leon. 113.
Style 434.
3 Leon 19.
1 Bulstr. 113.
Cr. Eliz. 443.
444, 695, 696.
2 Rol. 89.
O. Benl. 19.
Dy. 25. pl. 158.
Cr. Car. 75.
N. Benl. 36. pl.
63. Dall. 9. 39,
44, 45, 90.
1 Willon 341.
Cr. Eliz. 330.
2 Siderf. 78, 53.
Swinb. 282.
Hetl. 64.
(c) 1 Co. 95. a.
3 Co. 61. b.
5 Ed. 4. 6. a.
Plowd. 43. a.
56. b. Br. Done
28. 9 H. 7. 25. b.
Br. Entric con-
geable 94. 1 Co.
98. b. 137. b.
(d) 6 R. 2.
cap. 6. 1 Co.
95. a. Plowd.
42. b. 45. b.
2 Inst. 434.
Long. 5 to Ed. 4.
58. a. 1 H. 6. 1. a.
Fitz. Corone 10.
Br. Rape 4.
Br. Appeal 48.
Br. Parliam. 89.
Stamf. Cor. 82.
(e) Co. Lit. 10. b.
Raym. 23.
Swin. 398.
Cawly 224.
225. B. N. C.
415. Post, 404. a.

see Blackstone Chap. Tenants
in common

shall be granted; and there it is said, *quod pueri sunt de sanguine parentum, sed pater & mater non sunt de sanguine puerorum*, and that is the reason that no land can (a) descend from the son to the father or mother, but shall rather escheat to the lord, because the father or mother is not of the blood of their son. Against which it was argued, that the mother should take advantage of this forfeiture. And the said book of (b) 5 E. 6. was utterly denied to be law, and that it had oftentimes been resolved against it, *scil.* That administration may be granted of the goods of the son or daughter, to the father or mother, as to the next of blood, and that is well proved by Littleton in his first chapter of his book, where it appears, that if there be father, uncle and son, and the son dies, that the uncle shall be heir to the son, and not the father, and yet the (c) father is more near of blood, which are Littleton's words, which, as was said, decide the point now in question. And on the words of Littleton it was concluded, that in the said case of father, uncle and son, if a lease be made to the son, the remainder to the next of his blood, that the father in case of purchase, shall have the (d) remainder for by the judgment of Littleton he is the next of blood. And although in every art and science there are *principia & postulata*, of which it is said, *altiora ne quaesiveris, & principia probant, & non probantur*, because every proof ought to be by a more high and supreme cause, and nothing can be more high and supreme than the principles (e) themselves, and therefore ought to be approved, because they cannot be proved. And Littleton saith, that it is a maxim in law, that an inheritance may lineally descend, and not ascend; and that appears by Glanville, who wrote in the time of H. 2. lib. 7. cap. 1. fol. 44. b. (f) *quælibet hæreditas, naturaliter quidem ad hæredes hæreditabiliter descendit, nunquam autem naturaliter ascendit*: And by Bracton also, who wrote in the time of Hen. 3. lib. 2. cap. 29. (g) *descendit itaque jus quasi ponderosum, quod cadens deorsum recta linea vel transversali, & nunquam reascendit ea via, qua descendit post mortem antecessorum*. And therewith agrees Britton, who wrote in the time of E. 1. cap. 119. *de successione*. Yet because the common law doth differ in this point from the civil law, these reasons of this principle of the common law were alledged, *scil.* That in this point, as almost in all others, the common law was grounded on the law of God, which was said, was *causa causarum*, as appears in the 27th chap. of (h) Numbers, where the case which was in judgment before Moses was, that Salphaad had issue five daughters, and having divers brothers, died, to whom his inheritance should descend was the question the daughters claiming

(a) Lit. sect. 3.
Co. Lit. 10. b.
D. & Stud. 13. a.

(b) Br. Administration 47.
Antea 39. b.

(c) Lit. sect. 3.
Co. Lit. 10. b.

(d) Co. Lit.
10. b.

(e) F.N.B. præf.
1 Inst. 11. a.

(f) Co. Lit. 11. a.

(g) Co. Lit. 11. a.

(h) Co. Lit. 11. a.
Noy. 161.

claiming it *jure propinquitatis*, as their birthright, and next heirs to their father; the brothers claiming it as heirs male *iure honoris*, to celebrate and continue the name of their ancestors: and this case seemed of great difficulty to Moses, and therefore, for the deciding of that question, Moses consulted with God; for the text saith, *retulitque Moses causam earum ad iudicium Domini, qui dixit ad eum, justam rem postulant filiae Salphaad. Da eis possessionem inter cognatos patris sui, Et ei in hæreditatem succedant: ad filios autem Israel loqueris hæc: homo cum mortuus fuerit absque filio, ad filiam ejus transibit hæreditas, si filiam non habuerit, habebit successores fratres suos, quod si fratres non fuerint, dabitur hæreditas fratribus patris ejus; sin autem nec patruos habuerit, dabitur hæreditas his qui ei proximi sunt, eritque hoc filiis Israel sanctum lege perpetua, sicut præcepit Dominus Moysi.* By which general law (which extends not only to the said particular case, but to all other inheritances, to all persons, and at all times) it appears that the father himself, and all lineal ascension, is excluded.

Another reason of the said principle was alledged, for avoiding of confusion in case of descents, if not only lineal and collateral descent would be allowed, but lineal ascension also, which is one of the causes of such diversity of opinions in cases of descents in the civil law; and the contrary is one of the causes of the certainty of rules of the common law in case of descents and inheritance, being *ponderosum quoddam*, as Bracton said, *jure naturæ descendit*, and not *ascendit*, for *omne grave fertur deorsum*. And it was said at the bar, if in this case he in the reversion had been brother of the half blood to the daughter that consented, &c. he might enter as *proximus de sanguine*, and yet he could not inherit lands in fee-simple, as heir to his sister in such case, in which point also the common law doth differ from the civil law; for by the common law of England, if a common person hath (a) issue a son and a daughter by one venter, and a son by another venter, and died seised of lands in fee simple, and the elder son enters into the land, and dies without issue, the sister of the whole blood shall inherit to him, and not the brother of the half blood. And that was the ancient common law of this land, and always continued, as appears by Glanville, lib. 7. cap. 1. Bracton, lib. 2. cap. 30. and by Britton, cap. 119.

And the reason of the common law is notable, and may be collected by the said ancient authors of the law, that every one who is heir to another, *aut est hæres jure (b) proprietatis*, as the eldest son, who alone shall inherit before all his brothers,

(a) Lit. sect. 8.
Co. Lit. 14. b.
3 Wilfon 516.
10 528.

(b) Co. Lit. 10. b.

brothers, *aut jure* (a) *repræsentationis*, as where the eldest son dies in the life of his father, his issue shall inherit before the younger son; for although the youngest son is *magis propinquus*, yet *jure repræsentationis* the issue of the eldest son shall inherit, for he represents the person of his father, and, as Bracton saith, *jns proprietatis*, which his father had by birth-right, descends to him, *aut jure propinquitatis*, (b) as *propinquus excludit remotum*, & *remotus remotiorem*; *aut jure sanguinis*, and by force thereof, in the said case, the daughter shall inherit before the son, and that for divers causes; in as much as the blood which is betwixt every heir and his ancestor makes him heir, for without blood none can inherit: and therefore it is great reason, that he who hath full and whole blood, should inherit before another who had but a part of the blood of his ancestor, for *ordine naturæ totum præfertur unicuique parti*. And therefore Bracton saith, *quod propter jus sanguinis* (c) *duplicatum*, *tam ex parte patris, quam ex parte matris, dicitur hæres propinquior soror, quam frater de alia uxore*. And Briton saith, that the right of blood in this case causes the female to foreclose the male.

2. As none can be begotten but of a father and mother, and ought to have in him two bloods, that is to say, the blood of his father and the blood of his mother; these bloods commixt in him by lawful marriage constitute and make him (d) heir; so that none can be heir to any, unless he hath in him both the bloods of him to whom he will make himself heir, and therefore the heir of the half blood cannot inherit, because he wants one of the bloods which should make him heritable, as Aristotle lib. *Topicorum*; *parte quacunque integrante sublata, tollitur totum, quod verum est si accipias partem integrantem pro parte necessaria*: as in this case, the blood of the father and of the mother are but one inheritable blood, and both are necessary to the procreation of an heir, and therefore *deficiente uno, non potest esse hæres*. And on this reason it seems to Britton, cap. 5. if a man be attainted of felony by judgment, that the heirs begotten after the attainder are excluded of all manner of succession of heritage, as well on the part of the mother, as on the part of the father; and the reason thereof was, that the son begotten after the judgment had not two heritable bloods in him; for, at the time of the begetting of him, the blood of the father was corrupted; for *ex leproso parente leprosus generatur filius*; and when the father is attained of felony, the blood, in respect of which

(a) Co.Lit. 10.b

(b) Co.Lit. 10.b.

(c) Co.Lit. 14.2.

(d) Co.Lit. 14.2.

(e) Co.Lit. 72.2.
ibid. 200. Jenk
Cent. 3.

he should be heritable, being corrupted, the son, as seemed to him, had but half blood; that is to say, the blood of the mother in him uncorrupted; and therefore he held, that such son should not inherit to his mother. And with him agrees Bracton, lib. 3. cap. 13. *Non valebit felonis generatio, nec ad hæreditatem paternam, vel maternam; si autem ante feloniam generationem fecerit, talis generatio succedit in hæreditatem patris, vel matris, a quo non fuerit felonia perpetrata*; because at the time of his birth he had two lawful bloods commixt in him, which cannot be corrupted by the subsequent attainder, but only as to him who offended.

The third reason was for avoiding of confusion; for if as well the half blood as the whole blood should be equally heritable, then in many cases confusion and incertainty will ensue who should be the next heir; and if a man would advance any that is of half blood to him, he might easily convey some of his inheritance to him at his pleasure: and therefore it was concluded, that the common law, which prefers the whole blood before the half blood, was grounded on greater reason than the civil law in this point: (yet in some cases the half blood may inherit by our law, i. e.) *Aut jure sive ratione doni*, and in that the common law doth admit the half blood to inherit. As if a man makes a gift to one and his heirs of his body, and he hath issue a son and a daughter by one venter, and a son by another venter, and the father dies, and the elder son enters and dies, the younger son shall inherit *per formam doni*, for he claims as heir of the body of the donee, and not generally as heir to his brother; and this is the reason that Littleton saith, *(a) quod possessio fratris de feodo simplici facit sororem esse hæredem*: in which rule every word is to be observed.

1. That the brother ought to be in actual possession of the fee and freehold, either by his own act, (b) or by the actual possession of another; but if neither by his own act, nor by the possession of another, he gains more than descends to him, the brother of the half blood shall inherit; and therefore if land, rent, (c) advowson, &c. descends to the elder brother, and he dies before any entry by him made into the land, or receive the rent, or present to the church, the younger brother shall inherit: and the reason thereof is, that of all hereditam, in possess. he who claims such

Vet. Nat. Brev.
145. a. Bro.
Descents pl. 56.
8 E. 3. 11. b. per
Herle.

(a) Lit. sect. 8.
Co. Lit. 15. a. b.
3 Willon 520.
525.

(b) Co. Lit. 15.
a. b. Kelw. 110.
a.

(c) Co. Lit. 11.
b. 15. b.
1 Ro. 628.

such hereditaments as heir, ought to make himself heir to him who was last actually seised, as it is held 11 H. 4. 11. 19 Aff. 27. 34 Aff. 10. 19 E. 2. *quare imp.* 177. 45 E. 3. 13. and Littleton, cap. 1. For if there be father, uncle, and son, and the son purchases land, and dies without issue, and the land descends to the uncle, if the uncle dies before entry, the land shall not descend to the father, for then he ought to make himself heir to him who was last actually seised, and that was the son; and therefore Littleton saith in such case, if the uncle enter, &c. then the father shall have the land as heir to the uncle; and in this case the father was last actually seised, and the sister cannot claim the land as heir to the father; for the younger son is heir to him: but if the elder son enters, and by his own act hath gained the actual possession, or if the lands were leased for years, or in the hands of a guardian, and the lessee or guardian possess the land, there the possession of the lessee or guardian doth vest the actual fee and freehold in the elder brother: and in such case the sister shall inherit as heir to her brother, who was last actually seised: but of a reversion, or a remainder expectant on an estate for life or in tail, there he who claims the reversion as heir, ought to make himself heir to him who made the gift, or lease, if the reversion or remainder descend from him: or if a man purchase such reversion or remainder, he who claims as heir ought to make himself heir to the first purchaser; and all this appears, 24 E. 3. 24. 37 Aff. 4. 40 E. 3. 9. 42 E. 3. 10. 45 E. 3. Releases 28. 49 E. 3. 12. 7 H. 5. 3 & 4. 8 Aff. 6. 35 Aff. 2. 5 E. 4. 7. 3 H. 7. 5. 40 Aff. 6. 21 H. 7. 33. And by these rules (good reader) you will well understand your books, and the true reason of them; and by that which hath been said it appears, that if the King, by his letters patent, create one a Baron, and gives the dignity to him and his heirs, and he hath issue a son and a daughter by one venter, and a son by another, and dies, and afterwards the elder son dies without issue, in this case the dignity shall descend to the younger; for it cannot be said that the elder son was in possession of the dignity, no more than of his blood, for the dignity is inherent to his blood; and neither by his own act, nor by the act of any other doth he gain more actual possession (if it may be so termed) than by the law descended to him; and then the younger brother shall make himself heir to his father, and not to his brother; so that the word (*possessio*) which is but *pedis positio*, extends only to things of which a man by his entry or other act may get the actual possession.

2. Littleton saith, *possessio fratris de feodo simplici*, and these words, *feodum simplex*, exclude estates tail.

F 2

3. *Facit*

Lit. sect. 3.

Co. Lit. 11. b.
15. a.

Q. Carth. 128.

Co. Lit. 15. b.

3 Wilson 527.

Co. Lit. 12. a.

Co. Lit. 15. b.

Cro. Car. 601.

Co. Lit. 15. b.

Co. Lit. 15. b.

3. *Facit sororem hæredem*, by which is implied, that in this case, *soror est hæres factus*, and that the law without other act doth not make the sister heir; but the younger brother is after the death of the elder brother *hæres natus* to his father. But the act by which the elder brother gains actual possession *facit sororem hæredem*; so that when the elder son hath not actual possession, or if it be such an inheritance of which an actual possession cannot be gained *per pedis positionem*, or by some other act, it shall by law descend to the brother of the half blood: and so it was concluded by the plaintiff's counsel, that the father, or mother, or brother of the half blood, might be next of blood within the purview of the said act; and that in this case it appears by the verdict, that the mother, and not the other sister, ought to take advantage of this forfeiture: but the court resolved, that the said points on the statute who should be next of blood to enter for the forfeiture, could not come in judgment in this case, because the issue was joined upon a collateral point, *scil.* Whether Elizabeth the mother had the custody of the said Martha at the time of the said contract; and therefore all the other matter concerning the forfeiture, and who should take benefit thereof, was out of the issue; and the finding of the jury (as to that) was without warrant, and not material: and for this cause, although in truth the plaintiff, as it here appears, had good right against the defendant, yet for as much as the issue was found against him, judgment was given that the plaintiff *nihil capiat per billam*.

Q. 2 Salk. 663.

Coke and others were of counsel with the plaintiff, and Godfrey and others with the defendant.

[Where a verdict, finding more than is in issue, shall be good for what was in issue, and the surplus rejected, see 3 Co. 9. 4 Co. 43, 46. 5 Co. 2. Part 30. 6 Co. 47. 9 Co. 12. 34. 11 Co. 11, 13, 20. By the stat. 23 Car. 2. c. 24. the father may dispose of his child or children until 21, although the father be under 21, see Vaugh. Rep. 177. a good exposition upon that stat. see 2 Blackst. Com. cap. 5. fol. 67, 87, 97.]

BOYTON's Case.

Mich. 34 and 35 Eliz.

In the King's Bench.

THOMAS BOYTON, clerk, parson of Hefset in Suffolk, brought an *audita querela* against William Andrews and Lewis Sympson, setting forth how the defendants in the King's Bench had recovered against the plaintiff 50l. debt and damages, and that after the judgment, *scil.* 2. Julii, 31 Eliz. at Bury St. Edmunds, in the county of Suffolk, within the liberty and franchise of Sir Roger Townshend, Knt. and William Dixe, Esq. by Purdey and Dey, *virtute cujusdam warranti nuper antea eisdem prædictis Rogero & Will' facti*, *virtute cujusdam warranti eisdem Roger' & Will' per Philippum Tilney Armig' tunc vicecom' prædict' com' Suff. sub sigil' officii sui confecti*, de & super quodam breve de capias ad satisfaciendum præfat' Willielmo Andrews & Lodovico Sympson de debit' & damnis præd', ad prosecutionem ipsius Will' Andrews & Lodovic' a præd' curia nostra coram nobis emanant', et vic' prædict' Suff. nuper direct', &c. the said Tho. Boyton was taken and arrested in execution until the said Roger and Will. Dixe, the said *Tho. Boyton* at Lambeth in the county of Surry, the said debt and damages not satisfied, *extra prisonam prædict' evadere & ad largum quo voluit ire permiserunt*. The defendants pleaded, that the said Roger and Will. Dixe, *non permiserunt eundem Tho. Boyton extra prisonam præd' evadere, & ad largum ire quo voluit, modo & forma prout*, &c. And thereupon the jury gave a special verdict to this effect; that the plaintiff was in execution prout, &c. and that the said Roger and William Dixe, Bailiffs

Moor 299.

of the said franchise *adduxerunt* him to Westminster within the county of Middlesex, *die Lunæ ante retorn' brevis de capias ad satisfaciend'*, (the day of the return being *die Lunæ post crastin' Animarum*) so that the Bailiffs mistook the day of return; and that the said Bailiffs, in the interim, before the return of the writ, at the request of the plaintiff, carried him to Lambeth within the county of Surry; which town of Lambeth is next adjoining to Westminster, but out of the way, and not in the way from the county of Suffolk to Westminster. And that at the return of the said writ the Bailiffs did deliver the said Boyton to the prison of the King's Bench by virtue of the said writ; and that the plaintiff, from the time of the arrest, until the return of the said writ and delivery of him to the prison aforesaid, did remain and continue with the Bailiffs by virtue or colour of their warrant. And whether on the whole matter the plaintiff were at large and out of prison, was the question: and judgment was against the plaintiff; and in this case these points were unanimously resolved by the court.

First, it was objected, that the command of the writ of *capias ad satisfaciendum* was to have the body of the plaintiff at the Court of King's Bench, which then was at Westminster; and for as much as they carried the prisoner beyond Westminster, that is to say, to Lambeth in another county, which was not warranted by the writ, it must of necessity be an escape: for the writ gave them authority to bring him to Westminster, for there was the King's Bench; and therefore when they carry him farther, to Lambeth in another county, it is without warrant, and by consequence an escape; for the Bailiffs could not have the custody of him there as Bailiffs of the franchise, for that was out of the franchise; and by force of the writ they could not have custody of him, because they have not pursued the writ; and if the Bailiffs should be suffered to carry him to Lambeth, by the same reason they may carry him to York, or to any other remote part of the realm, at their pleasure.

Secondly, it was said, that in as much as the writ, which is their warrant, was to have his body at the court of King's Bench such a day, they ought to bring the body the usual way to Westminster, where the King's Bench then was, for so much is implied by the writ; and therefore the carrying of his body to Lambeth in another county, was without warrant, and by consequence an escape, and the plaintiff thereby out of their custody.

To which it was answered, and resolved by the court, that, first, there was a difference between the custody of one in execution within the franchise or county where the common gaol is, or the office of the Sheriff or Bailiffs extends, and where the Sheriff or Bailiff hath the custody
of

of one in execution out of their franchise or county, as in the case at bar by force of a writ: for if the Sheriff or Bailiff of a liberty assent that one who is in (a) execution and under his custody go out of the gaol for a time, and then to return, although he return at the time, yet it is an escape. So if the Sheriff, &c. suffer him to go by bail or (b) baston, for the Sheriff or Bailiff ought to keep him in (c) *salva & aeterna custodia*. And the stat. of West. 2. cap. 11. saith, *quod carceri mancipentur in (d) ferris*, so as the Sheriff may keep them who are in execution in fetters and irons, to the end they may the sooner satisfy their creditors. And with that agrees a resolution, Trin. 24 H. 8. by the advice of Fitz-James and (e) Norwich, C. Justices, and Fitzherbert and Spilman Justices, that by the law, those who are in execution shall not go at their liberty within the prison, nor out of the prison with the keeper, but shall be kept in strict ward, *vide* Dyer (f) 249. b. and the statutes of 2 R. 2. cap. 12. & Westm. 2. cap. 11. But it was adjudged, where the Sheriff hath one in execution for debt, and a (g) *habeas corpus* issues out of the K.'s Bench to have the body of him who is in execution in the same court at a certain day, by force of which writ, the Sheriff, before the return of the writ, brings his body to an inn in Smithfield towards Westminster, and the prisoner of his own head goes without any keeper to Southwark, in the county of Surry, and the next morning comes again to the Sheriff to Smithfield, and at the return of the *habeas corpus* the Sheriff delivers his body in court; this was no escape,

And so it was adjudged in this court 31 Eliz. in Charnock's case, who was Sheriff of Bedford, for the effect of the command of the writ was performed, *scil.* to have his body in the King's Bench such a day; and this stands with great reason, for the Sheriff, &c. may more strongly guard his gaol, than every inn or other place through which he travels; *a fortiori* in the case at bar, for he was always under the custody of the Bailiffs. And the writ doth not command the Sheriff to bring him the direct or usual way to Westminster, &c. but only to have his body in the King's Bench, &c. such a day. And therefore if one be Sheriff of two counties, and hath arrested and taken several persons in execution in the several counties by force of several *capias ad satisf.* directed to him; he may in that case bring one prisoner out of the one county into the other, to carry them both together to the King's Court at Westminster. without any escape; and what way or place the Sheriff thinks most sure for him, he may take.

And some conceived that the case at bar was stronger, because the prisoner went to Lambeth at his own request; and therefore he shall not discharge himself by *audita querela* in this case. And for as much as escapes are so (b) penal to Sheriffs, Bailiffs of liberties, and Gaolers, the Judges

(a) 1 Rolle's 806.
Hob. 202. Dalt.
Sher. 140.
Cr. Car. 14.
3 Wilson 295.
(b) 1 Rolle's 806.
Plowd. 36. b.
37. a. b.
Hob. 202.
Co. Lit. 206. a.
Dalt. Sher. 140.
Cr. Eliz. 5 Benl.
in Kelw. 214.
N. Benl. pl. 267.
Benl. in Ash. 29.
(c) Hard. 30.
2 Inst. 381.
8 Co. 100. a. b.
Dalt. Sher. 140.
Cr. Car. 466.
Co. Lit. 260. a.
1 Rolle's 807.
3 Inst. 35.
(d) 1 Buist. 145,
146. Dalt. Sher.
140. 1 Rolle's
807. 2 Inst. 381.
(e) 1 Rolle's 807.
Dy. 249. pl. 84.
(f) 1 Rolle's 807.
Dy. 249. pl. 84.
Postea 78. b.
(g) Dalt. Sher.
141. Moor 257.

(b) Dalt. Sher.
43.

of the law have always made as kind and favourable constructions as the law would suffer, in favour of Sheriffs, Bailiffs of liberties, and Keepers of prisons, who are officers and ministers of justice. And to the intent that every one should bear his own (a) burthen, the Judges would never adjudge one to make an escape by any strict construction.

(a) Hard. 31.

And therefore if one in execution escapes out of prison, and flies into another county, it may be argued that this shall be an escape, although he be re-taken on fresh suit, because the Sheriff cannot have the custody of him in (b) another county, in regard he is not Sheriff there, neither doth his authority extend thither. But the Judges, nevertheless, will adjudge it no escape, because the Sheriff did all he could, and by his (c) fresh suit hath re-taken him before any action brought, so in the case at bar, when the prisoner is once out of the proper county, although he goes into another county which is not in the way to Westm. where the K.'s Bench sits; this, by a favourable construction in law, is not an escape, if at the day of the return he have the body of the defendant in court. And if the Sheriff, &c. should be compelled to bring his prisoners to the K.'s Court as *in recta linea*, it would be too full of hazard and very dangerous for Sheriffs, &c.

(b) Plowd.
37. a. b.

(c) Post. fol. 52.

b. 1 Roll's 808.

(d) Moor 57.

Cr. Eliz. 44.

102, 439, 555.

Moor 600.

Cr. Car. 240.

Postea 52. b.

Styles 117.

Ridgway's Case.

Secondly, it was resolved, that if one in execution escape of his own wrong, and be re-taken, he should never have an *audita (d) querela* to discharge himself of the imprisonment, because he shall not take advant. of his own wrong; and in such case it is lawful for the gaoler to re-take him, as it more fully appears in the following case: and where it was objected, that the writ was not good, because it doth not appear that the warrant made by the Bailiffs was in writing; for the words of the writ are, *virtute cujusdam warranti*, and doth not say in writing, as hath been said. But that exception was disallowed by the court; for the sentence is, (f) *virtute cujusdam warranti per præfat' R. & W. fact' & direct', &c.* by which words (*fact' & direct'*) is implied that it was in writing.

(e) Postea 53. a.
Poph. 41. Moor
660. Cr. Eliz.
318. 439.
Goldsb. 180.

(f) 2 Jones 197.

Another exception to the writ was taken, that it doth not appear thereby when the judgment was given, nor when the *capias ad satisfaciendum* issued, nor when it was returned, so that it might appear that the defendant was arrested by force of it after the *teste* of the writ, and before the return of it; but that exception was also disallowed by the court; for as much as it (g) appears by the writ, that the said Thomas Boyton the plaintiff, *virtute brevis præd' captus & arrestatus fuit in executione*, by these words it is implied, that it was lawfully and duly done. And it was agreed, that writs are more compendious than counts, and counts than other pleadings, for writs comprehend the effect and substance without circumstance of time or place, and other circumstances. *Et ideo dicuntur breviter, propter eorum breviter.*

(g) Yelv. 201.

Sir GEORGE BROWN's Case.

Hil. Term. 36 Eliz, in B. R. Rot. 440.

Cro. Eliz. 513.
it is Rot. 445.

WILLIAM SPENCER, late of Swindon in the county Wilts, ff. aforefaid, Yeoman, and Thomas Spencer, late of Swindon in the county aforef. Yeoman, were attached to answer James Lynch of a plea wherefore with force and arms they entered into one messuage, one barn, one garden, eighty acres of land, eighty acres of meadow, and eighty acres of pasture, with the appurtenances, in Swindon, which George Brown, Knt. to the aforef. James demised for a term which is not yet ended, and ejected him from his farm aforefaid, and other harms did unto him, to the grievous damage of the said James, and against the peace of the lady the now Queen, &c. and whereupon the said James, by Thomas Cowper his attorney, complaineth, that whereas the aforef. George Brown on the 22d day of Oct. in the 35th year of the reign of the now Q. at Swindon aforef. had demised to the said James the tenements aforef. with the appurtenances, to have and to hold the same tenements, with the appurtenances, to the said James and his assigns, from the feast of St. Michael the Archangel then last past, until the end and term of four years from thence next ensuing, and fully to be completed: by virtue of which said demise, the said James entered into the tenements aforefaid with the appurten. and was thereof possessed; and being so possessed, thereof the aforef. Will. and Tho. afterwa. that is to say,
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on the 22d day of October aforesaid in the 35th year afores. with force and arms, &c. entered into the tenements aforesaid, with the appurtenances, which the said George Brown to the said James in form aforesaid demised for the term aforesaid, which is not yet ended, and ejected him the said James from his farm aforesaid, and other harms, &c. to the grievous damage, &c. and against the peace, &c. whereupon he saith that he is injured, and hath damage to the value of 20l. and therefore he bringeth suit, &c. And the afores. William and Thomas by John Paxton their attorney come, and defend the force and injury, when, &c. and say that they are not guilty of the trespass and ejectment afores. as the afores. James above against them complaineth: and of this they put themselves upon the country; and the afores. James likewise, &c. Therefore it is commanded to the Sheriff, that he cause to come here in eight days of the Purification of the blessed Mary 12 good and lawful men, &c. by whom the truth, &c. and who neither, &c. to recognise, &c. because as well, &c. Afterward the process between the parties afores. was continued of the plea afores. by the jurors between them put being respited here until this day, that is to say, in eight days of St. Mich. in the 37th year of the reign of the lady the now Q. unless the Justice of the lady the Q. assigned to take the assizes in the county afores. by the the form of the stat. upon Thursday the 17th day of July last past, at New Sarum in the county afores. first came. And now here at this day come as well the afores. James Lynche, as the afores. Will. Spencer and Thomas Spencer by their attornies, afores. and the afores. Justices of assize before whom, &c. sent here their record in these words; afterw. at the day and place within contained before Tho. Walmesley, one of the Justices of the lady the Q. of the Bench, and Ed. Fenner, one of the Justices of the said lady the Q. assigned to hold pleas before the Q. herself Justices of the lady the Q. assigned to take the assizes in the county of Wilts, by form of the statute, &c. came as well the within named James Lynche as the said within written Will. Spencer, and Tho. Spencer by their attornies within mentioned; and the jurors of the jury whereof within mention is made being called, some of them, that is to say, William Garret of Shaw, Gent. William Bury of Crickland, Thomas Buckley of Nether Haven, Gent. William Morfe of Haydon, John Noyse of Grafton, Richard Legge of Nether Haven, Thomas Smith of Kennet, Thomas Sloper of Mounton, and William Gouldeborough of the same came, and are sworn of the same jury, and because that the rest of the jurors of the jury did not appear, therefore others of the standers-by, chosen by the Sheriff of the county aforesaid at the request of the said James,

James, and by the command of the Justices aforef. were newly put, whose names to the panel within written are filed, according to the stat. in such case lately made and provided: and the jurors so of new put, that is to say, Thomas Sringer, Will. Bundy, and Will. Hascall, being likewise called came, who to say the truth of the matter within contained, together with the other jurors aforef. first impanelled, being chosen, tried and sworn, say upon their oath, that the aforef. Will. Spencer is not guilty of the trespass and ejectm. within written, as the said Will. hath within alledged; and further the said jurors, as to all the trespass and ejectm. aforef. within written, except the trespass and ejectm. in the messuage within contained, and 26 acres of the tenements within specified by the aforef. Thomas Spencer within supposed to be done, they say upon their oath, that the said Tho. is not thereof guilty, as the said Tho. likewise thereof within alledgeth; and as to the trespass and ejectment within specified in the aforef. messuage and 26 acres of land within supposed to be done, the same jurors say upon their oath, that long before the within written time when it is supposed the trespass and ejectment aforef. to be done, one Rich. Bridges, Knt. was seised as well of the aforef. messuage and 26 acres of land with the appurtenances, as of the residue of the other tenements within written, with the appurtenances, in his demesne as of fee; and being so seised thereof the said Rich. long before the time aforef. when, &c. by his certain writing of feoffment indented, in consideration of a certain jointure of one Johanna his wife, daughter of Will. Spencer, Knt. deceased, then afterwards to be had and made, gave and granted, and in his said writing indented confirmed to John Winchcombe the elder, of Newbury, in the county of Berks, and John Knight of Newbury aforef. the aforef. messuage and 26 acres of land, in which, &c. (amongst other things,) to have and to hold the said messuage and 26 acres of land, in which, &c. (amongst other things,) to the said John Winchcombe and John Knight, their heirs and assigns for ever, nevertheless under this condition following, that is to say, that the said John Winchcombe and John Knight, within one month next ensuing after the date of the said writing, by their sufficient writing in law, as by the learned counsel in the law of the said Richard Bridges it should be advised, should give, grant, and deliver the aforesaid messuage and 26 acres of land, in which, &c. (amongst other things, to the said Richard and the said Johanna his wife; to have and to hold the said messuage and 26 acres of land, in which, &c. (amongst other things,) to the said Richard and the said Johanna his wife, and to the heirs of the bodies of the said Richard and the said Johanna his wife, betwixt the said Richard and the said Johanna lawfully begotten; and for default

default of such issue, the remainder thereof to the right heirs of the afores. Richard for ever, of the chief lords of the fee by the services thereof due and of right accustomed, as by the said writing of feoffment indented, sealed with the seal of the said Richard Bridges, and bearing date the 23d day of January in the 32d year of the reign of the Lord Henry the 8th, late King of England, to the jurors afores. in evidence shewed, more fully appeareth; and that by virtue of the said feoffment, the afores. John Winchcombe and John Knight were seised of the afores. messuage and 26 acres of land, in which, &c. (amongst other things) in their demesne as of fee, upon the condition aforesaid: and further the jurors afores. say upon their oath, that the said John Winchcombe and John Knight being so seised thereof long before the afores. time, when, &c. and within the said one month next ensuing, after the date of the said writing of feoffment indented at Walcot aforesaid in performance of the condition afores. and at the request of the said Rich. Bridges, by their certain writing indented of feoffment, conveyed, enfeoffed and delivered, and by their same writing indented, did confirm to the afores. Rich. Bridges and Johanna his wife the afores. messuage, and 26 acres of land, in which, &c. (amongst other things;) to have and to hold the afores. messuage, and 26 acres of land, in which, &c. (amongst other things) to the afores. R. Bridges and Johanna his wife, and the heirs of the bodies of them the said Rich. and Johanna betwixt them lawfully begotten; and for default of such issue, the remainder thereof to the right heirs of the said R. Bridges for ever, of the chief lords of the fee by the services thereof due, and of right accustomed, as by the said writing of feoffment indented, sealed with the seals of the said John Winchcombe and John Knight, and bearing date the 6th day of February in the 32d year of the reign of the afores. late King Henry the 8th afores. and to the jurors afores. in evidence shewed, it more fully appeareth: and that by virtue of the said feoffment, the afores. Rich. Bridges and Johanna were seised of the afores. messuage and 26 acres of land, in which, &c. (amongst other things) in their demesne as of fee-tail, that is to say, to the said Rich. and Johanna, and the heirs of their bodies between them lawfully begotten; the remainder thereof to the right heirs of the said Rich. as above is said: and the said Rich. and the said Johanna being so seised thereof had issue of their bodies between them lawfully begotten, one Anthony Bridges their son yet living and in full life being, that is to say, at West Shefford in the county of Berks; and that afterwards, and before the said time, when, &c. the aforesaid Richard Bridges and Johanna being seised of the aforesaid messuage and 26 acres of land, in which, &c. (amongst other things,) in form aforesaid, the said Richard before the aforesaid time, when, &c. at Ludgershall in the said county of Wilts, of such his estate died thereof seised: and the aforesaid Johanna him survived and held herself *in* in the aforesaid messuage and 26 acres of land, in which, &c. (amongst other things) and was thereof sole seised in her demesne as of fee-

fee-tail in form afores. the remainder thereof over as before is said: and further the jurors afores. say upon their oath, that the said Johanna being so seised thereof the afores. Anthony Bridges on the 4th day of December in the 32d year of the reign of the said lady the now Q. at Walcot afores. by his indenture made between the afores. Anthony Bridges, son of the afores. Richard and Johanna, and Barbara then wife of the said Anthony, and one Edward Langford, Gent. by the name of Anthony Bridges of West Shefford, otherwise Great Shefford, in the county of Berks, Esq. and Barbara his wife, and Edward Langford of Lincoln's Inn, Gent. of the one part, and one George Brown, Knt. by the name of George Brown, Esq. second son of the Right Hon. Anthony Viscount Brown, Knt. of the most noble order of the Garter, of the other part; which other part sealed with the seals of the said Anthony Bridges, Barbara, and Edward Langford, bearing date the same day and year, to the jurors afores. in evidence shewed, it was covenanted, granted, condescended unto, concluded and fully agreed by and between the said parties to the said indenture, in manner and form following; that is to say, that the said Anthony Bridges son of the said Richard Bridges and Johanna, and Ed. Langford, covenanted and granted for themselves their heirs and assigns, to and with the afores. George Brown, his heirs and assigns, by the same indenture, that they the said Anth. Bridges son of the afores. Rich. Bridges and Johanna, and Barbara, together with the afores. Edward Langford before Easter term then next following, would levy and acknowledge before the Justices of the said lady the Q. of the Bench at Westm. a certain fine or diverse fines with proclamations, according to the course of fines in the said court used, to the afores. George Brown, of all that manor of Kintbury, with all and singular the rights, members and appurt. in the afores. county of Berks; and of all the messuages, lands and tenem. rents, services, advowsons, patronages, liberties, privileges, profits and hereditaments, with all and singular their appurt. to the said manor belonging or appertaining, and also of the afores. whole tenem. within specified, by the name of the lands, tenem. and hereditam. with the appurt. called or known by the name of Walcot, lying in Swindon within written, whereof the afores. messuage and 26 acres of lands then were and yet are parcel: as also of all the messuages, cottages, lands, tenem. rents, services and hereditaments whatsoever to the same belonging, occupied, reputed, demised or taken as part or parcel thereof, by the name of 40 messuages, 20 tofts, 1 dovehouse, 30 gardens, 20 orchards, 1000 acres of land, 300 acres of meadow, 1000 acres of pasture, 1000 acres of wood, 500 acres

acres of furze and heath, and 40s. of free rent, with the appurtenances in Kintbury, Holt, Hungerford, Walcot, and Swindon, in the counties of Berks and Wilts, or by whatsoever number of acres, either sole or together with any other manors, lands, tenements and hereditaments, and that the afores. fine, or the afores. fines, concerning the premises in the said indenture before mentioned, and the execution of the fine or fines should be and enure to the use of the said Geo. Brown his heirs and assigns for ever, and to no other use, intent or purpose: and the said jurors further say, that in performance and accomplishment of the covenant and agreement in the said indenture, between the said Anthony Bridges the son of the said Richard and Johanna, Barbara and Edward Langford, and the said George Brown in form afores. mentioned, afterwards, and before the afores. Easter term, that is to say, in the term of St. Hilary in the 32d year of the reign of the said lady the now Q. afores. a certain fine was levied in the court of the said lady the Q. at Westm. in the said county of Middlesex, before Edmund Anderson, Francis Windham, Will. Periam, and Thomas Walmsley, then Justices of the said lady the Q. and other the lady the Q.'s faithful people then there present, between the afores. George Brown plaintiff, and the aforesaid Anthony Bridges (son of the said Richard and Johanna,) and Barbara his wife, and Edward Langford, Gent. deforceants, of the whole tenements in the said indenture specified, whereof the said messuage and 26 acres of land are, and at the time of the levying of the said fine were parcel (amongst other things) by the names of the manors of Kintbury and Fally, otherwise Great Fally, with the appurtenances, and 60 messuages, 20 tofts, 3 dove-houses, 40 gardens, 50 orchards, 4000 acres of lands, 300 acres of meadow, 4000 acres of pasture, 300 acres of wood, 1000 acres of furze and heath, and 6l. 13s: 4d. of rent, with the appurten. in Kintbury, Holt, Fally, otherwise Great Fally, Hungerford and West-Shefford, otherwise Great Shefford: as also of the rectory of Great Fally with the appurtenances, and free warren and liberty of a park in West-Shefford, otherwise Great Shefford; and also the free fishery in Kennet in the county of Berks, and of the manor of Buddefden, with the appurtenances, and 20 messuages, 10 tofts, 12 gardens, 8 orchards, 1000 acres of land, 100 acres of meadow, 1000 acres of pasture, 200 acres of wood, 500 acres of furze and heath, and 40s. rent with the appurtenances in Buddefden, Ludgershall, Walcot, and Swindon in the county of Wilts; whereupon a plea of covenant was summoned between them in the said court, that is to say, that the said Anthony, Barbara and Edward, acknowledged the said manors, tenements, hereditaments, rents, rectory, warren, liberty and

and fishery, with the appurtenances, in the said fine contained, to be the right of the said George, as those which the said George had of the gift of the said Anthony, and the same remised and quit-claimed from the said Anthony, Barbara, and Edward, and their heirs, to the afores. George and his heirs for ever. And besides the said Anthony and Barbara granted for them and the heirs of the said Anthony, that they would warrant to the afores. Geo. and his heirs the afores. manors, tenements, rents, rectory, warren, and liberties, and fishery, with the appurtenances in the same fine contained, against the said Edward and his heirs for ever; and for that recognition, release, quit claim, warranty, fine and concord, the said George granted to the afores. Edward a certain yearly rent of 100 pounds, to be issuing out of and in the afores. manors, tenements, rent, rectory, warren, liberties and fishery, with the appurtenances in the same contained; and the same to him did render in the same court, to have, and to hold, and perceive the said yearly rent of 100 l. to the said Edward for the whole life of the said Johanna, by the name of the lady Johanna Bridges, mother of the said Anthony, at the feast of the Annunciation of the blessed Mary the Virgin, the Nativity of St. John the Baptist, St. Michael the Archangel, and the Birth of the Lord, by equal portions yearly to be paid for the whole life of the said Johanna; the first payment whereof to begin at the first of the feasts afores. which next after the decease of the said Anth. should happen to be, and if it should happen the said yearly rent of 100 l. or any part thereof to be behind in part or in all after any of the afores. feasts, in which (as before is said) it ought to be paid, not paid by the space of 30 days; that then and so often, the said Geo. and his heirs should forfeit to the said Edw. 4 l. 15 s. *nomine pænæ*, as often as the said yearly rent of 100 l. or any parcel thereof so to be behind should happen, and that then and so often it should be well lawful to the said Edw. all the life-time of the said Johanna, into the afores. manors, tenements, rents, rectory, warren, liberty, and fishery, with the appurtenances in the said fine contained, and every part and parcel thereof, to enter and distrain, and the distresses so there taken and had, lawfully to lead, carry away, and drive, and the same to keep, until as well of the aforesaid yearly rent of 100 l. with the arrearages thereof, if any should be, as of the aforesaid 4 l. 15 s. *nomine pænæ*, as before is said, he should be fully satisfied and paid. Also the aforesaid George granted to the aforesaid Anthony and Barbara the aforesaid manors of Buddefden and Fally, otherwise Great Fally, with the appurtenances and 20 messuages, 10 tofts, 10 gardens, 6 orchards, 1000 acres of land, 100 acres of meadow, 1000 acres of pasture, 100 acres of wood, 500 acres of

of furze and heath, and 50s. rent, with the appurtenances in Buddefden, Ludgershall, Fally, otherwise Great Fally, and West Shefford, and the rectory of Great Fally, with the appurtenances, and free warren, and liberty of a park in West Shefford, otherwise Great Shefford afores. parcel of the manors, tenements and rent afores. with the appurtenances in the said fine contained; and the same did render in the same court; to have and to hold to the said Anthony and Barbara, of the chief lords of the fee, by the services which to those manors, tenements, rent, rectories, warren, and liberty of park do belong, for the whole lives of the said Anthony and Barbara, and to the longest liver of them, without impeachment of any waste, for the whole life of the said Anthony: and after the decease of the said Anthony and Barbara, the same manors, tenements, rent, rectories, warren, and liberties of park, with the appurtenances, wholly to return to the said George and his heirs; to be holden of the lords of the fee, by the services which to those manors, tenem. rent, rectory, warren and liberties of park belonging, for ever: and the afores. jurors further say upon their oath afores. that the said Johanna being seised of the said messuage and 26 acres of land, (amongst other things,) with the appurten. in form afores. the said Johan. afterwards, and before the within written time when, &c. on the 7th day of October in the 32d year of the reign of the said lady the now Q. at Swindon afores. by her certain indenture of demise, between the same Johanna, by the name of Jane Harcourt of Ludgershall in the county of Wilts, widow, otherwise named the lady Johanna Bridges of Ludgershall in the county of Wilts, widow, of the one party, and Edward Bridges, Esq. Will. Bridges, and Anthony Bridges, sons of the said Edmund, and their assignees, of the other party made; which indenture is dated the 21st day of August in the 32d year of the reign of the said lady the now Q. afores. as well for and in consideration of the surrender of one indenture of demise before then granted, of all and singular the premises in the said indenture, to the afores. Johanna then after demised, or to be demised of 19 years and more then to come and not expired, which the afores. Edmund before that time had and enjoyed, as of a former indenture of demise, at or before the sealing and delivery of the said indenture then in evidence shewed, the aforesaid Edward Bridges had surrendered and delivered into the hands and possession of the said Johanna, as for divers other good causes and considerations the same Johanna specially moving, demised, granted and to farm let to the said Edward Bridges, William Bridges, and Anthony Bridges, sons of the said Edmund, the aforesaid messuage and 26 acres of land with the appurtenances, (amongst other things;)

to

to have and to hold the aforesaid messuage, and 26 acres of land (amongst other things) to the aforesaid Edmund, William, and Anthony Bridges, the afores. two sons of the said Edmund Bridges, for the term of their natural lives, and for the term of the life of the longest liver of them, and every of them successively to be enjoyed, yielding and paying therefore yearly, during the said term, to the afores. Johanna, under and by the name of Jane Harcourt, her heirs, and assigns, 4l. and 2d. of good and lawful money of England, at the two usual feasts or terms of the year, that is to say, at the feast of the Annunciation of the blessed Mary the Virgin, 40s. and 1d. and at the feast of St. Michael the Archangel the like sum of 40s. and 1d. residue of the aforesaid 4l. and 2d. as by the said indenture of demise to the said jurors in evidence shewed more fully appeared, by virtue of which demise the said Edmund Bridges, William Bridges, and Anthony Bridges, sons of the said Edmund, were seised of the aforesaid messuage and 26 acres of land within written, as the law requireth: and further the said jurors say upon their oath, that the afores. messuage, and 26 acres of land within specified, and the rest of the tenements in the said indenture of demise, by the said Johanna under and by the name of Jane Harcourt, to the said Edmund, William and Anthony, sons of the said Edmund, in form aforesaid demised, were not usually demised for the greater part of 20 years next before the same demise (as before is said) made for so little rent, as by the aforesaid indenture thereof now in evidence shewed, in form afores. was reserved: and the aforesaid jurors further say upon their oath, that the aforesaid Johanna afterwards, and before the said time when, &c. that is to say, on the 29th day of September in the 35th year of the reign of the said lady the now Q. at Ludgershal aforesaid died: after whose death the said George Brown thereupon entered into the tenements within written, with the appurtenances in which, &c. upon the possession of the said Edmund Bridges, William and Anthony Bridges, sons of the said Edmund, and was seised thereof as the law requireth: and being so seised thereof afterwards and before the afores. time when, &c. that is to say, on the within written 22d day of October in the 35th year afores. demised to the said James the said whole tenem. within written with the appurt. in which, &c. to have and to hold to the said James and his assigns, from the within written feast of St. Mich. the Archangel, until the end and term within mentioned of 4 years from thence next ensuing and fully to be completed; by virtue of which demise the said James entered into the said whole tenem. within written with the appurt. and was possessed thereof as the law requireth; upon whose possess. of the said James

the aforesaid Thomas Spencer as servant of the said Edmund Bridges, and by his command at the within written time when, &c. entered into the said messuage and 26 acres of land, and thereupon ejected the said James from his farm aforesaid: but whether upon the whole matter afores. by the afores. jurors in form afores. found, the entry of the said Tho. Spencer into the afores. messuage and 26 acres of land, with the appurtenances upon the possession of the said James thereof, be a good and lawful entry in law or not, the said jurors are altogether ignorant, and pray thereof the advice and discretion of the Justices here, &c. And if upon the whole matter afores. it shall seem to the Justices and court here, that the aforesaid entry of the aforesaid Tho. Spencer upon the possession of the said James Lynche be not a good and lawful entry in law, then the said jurors say upon their oath, that the said Tho. Spencer is guilty of the trespass and ejectment aforesaid, in the afores. messuage and 26 acres of land, as the aforesaid James against him within complaineth, and then they assess the damages of the said James, by the occasion of the said trespass and ejectment besides his charges and costs by him about his suit in this behalf expended to 4d. and for his charges and costs to 12d. And if upon the whole matter aforesaid, it shall seem to the Justices and Court here, that the aforesaid entry of the said Tho. Spencer upon the possession of the said James be a good and lawful entry in law, then the said jurors say upon their oath, that the said Tho. Spencer is not guilty of the trespass and ejectment afores. in the said messuage, &c. within alleged: and because the Justices here will advise themselves of and upon the premises before they give their judgment thereof, day is given to the parties aforesaid here, until in 8 days of St. Hil. to hear their judgment thereof, because that the said Justices here thereof are not yet, &c. At which day come as well the afores. James as the afores. Will. and Tho. by their attorneys aforesaid: and because the Justices here will further advise themselves of and upon the premises, before they give their judgment thereof, day further is given to the parties afores. here, until from Easter day in 15 days to hear their judgment thereof, because the said Justices here are not thereof yet, &c. At which day here come as well the said James by George Duncombe his attorney, as the said Will. and Tho. by their attorneys aforesaid: and because the Justices here will further advise of and upon the premises, before they give their judgment thereof, further day is given to the parties aforesaid here, until the morrow of the Holy Trinity to hear their judgment thereof, because the said Justices here thereof are not yet, &c. At
which

which day here come as well the aforef. James by the aforef. George Duncombe his attorney, as the said Will. and Tho. by their attorney aforef. and because the Justices here will further advise of and upon the premises, before they give their judgment thereof, further day is given to the parties here, until in eight days of St. Michael, to hear their judgment thereof, because the said Justices here thereof are not yet, &c. At which day here come as well the said James Linch, by the aforef. Geo. Duncombe his attorn. as the aforef. Will. Spencer and Tho. Spencer by their attorney: and upon this the verdict aforef. being seen; and by the Justices here fully understood, it seemeth to the same Justices here, that the aforef. entry of the aforef. Tho. Spencer into the aforef. messuage and 26 acres of land, upon the possession of the said James Linch, is not a good and lawful entry in law; therefore it is considered that the aforef. James Linch recover against the aforef. Thomas Spencer his term aforef. yet to come, of and in the aforef. messuage, and 26 acres of land with the appurtenances and his damages aforef. to 16 d. by the jurors aforef. in form aforef. assessed, as also 26 l. 9 s. to the said James at his request, for his charges and costs aforef. by the court here of increase adjudged; which damages in the whole do amount to 26 l. 10 s. 4 d. and that the aforef. Thomas be taken, &c. And also the said James in mercy for his false clamour against the aforef. Will. Spencer, of the whole trespass and ejectment aforef. and against the aforef. Tho. Spencer of the residue of the trespass and ejectment aforef. thereof the said Will. and Tho. by the jurors aforef. above be acquitted; therefore the said Will. and Tho. may go thereof without day, &c. And hereupon the said James prayeth the writ of the lady the Queen, to the Sheriff of the county aforef. to be directed, to give him possession of his said term yet to come of and in the aforef. messuage and 26 acres of land with the appurtenances, and it is granted unto him returnable here from the day of St. Martin in 15 days, &c. Afterwards, that is to say, on the 26th day of Novemb. in the 40th year of the reign of the said lady the now Queen, came here into court the aforef. James, by the aforef. George his attorney, and by a special warrant to him in that behalf made, confessed himself to be satisfied of the damages aforef. therefore the aforef. Thomas of the said damages is acquitted, &c.

See the Case of
Symonds and
Cudmore in
Skinner, &c.
and in Carth.
258, &c. and
Post. 77, & 84.

Sir GEORGE BROWN's Case.

Hill. 36 Eliz. in B. R. Rot. 445.

(a) Cr. Eliz.
513. 9 Co. 140.
b 1 Rolle's 878.
Hob. 258. Moor
455. 2 And. 44.
Cro. Car. 478,
479, 525.
Winch. 43, 44.

(b) 9 Co. 141. b.
142. a.
(c) Co. Lit. 326.
b. 305. b. Hob.
262. Cr. Jac.
689, 474, 475,
175. Cr. El.
514. 2 And. 44.
45 Hard 91.
Winch 43.
Lane 101.
Brid. 28.
3 Keb. 133, 333.

Wm. Jones 13.

(d) Cr. Eliz.
514. Bridg. 29.

IN an *ejectione firmæ* by (a) Thomas Lynch, on a demise made by Sir George Brown, against William Spencer, on not guilty pleaded, the jurors gave a special verdict to this effect: Sir Richard Bridges, seised of certain lands in fee, did thereof enfeoff Winscombe and others, on condition that they should give back the same to him and his wife, and to the heirs of their two bodies begotten; the remainder to the right heirs of Sir Richard; which was done accordingly; Sir Rich. had issue on the body of his wife Anthony Bridges, and died; Anthony Bridges, in the (b) life of his mother, levied a fine (which in truth was with (c) proclamations, although the proclamations were not found) to Sir George Brown in fee; the wife, (living the said Anthony) made a lease of the said land for three lives (which lease was not warranted by the statute of 32 H. 8. cap. 28.) whereupon Sir George Brown entered, and made the lease to the plaintiff: and whether the entry of Sir Geo. Brown were lawful or not, was the question; and after many arguments at the bar and bench, judgment was given for the plaintiff; and in this case three points were resolved.

1. That the lease made by the wife for three lives, altho' the lease were without warranty, was within the statute of 11 H. 7. cap. 20. the letter of which act is, "if any woman, &c. have or shall hereafter, being sole or with any other after-taken husband, discontinued or discontinue, aliened, released or confirmed, alien, release or confirm with warranty, &c." For these words, "with warranty," (d) refer to releases and confirmations, which make no discontinuance without warranty; for the intent of the act was to prohibit not only every bar, but every manner

manner of discontinuance also, which puts the heir to his real action, by which sometimes the heir was disinherited, and always greatly delayed; and for as much as a release or confirmation makes no discontinuance without warranty, for this cause the warranty shall be referred to them, to make them equivalent to such estate which passeth by livery which of it, self, without warranty, is a discontinuance. Note; the title of the act is, "discontinuance of right or estate;" and afterwards in the act it is said, "lands, tenements or hereditaments being discontinued, aliened or suffered to be recovered." And afterwards, "as if no such discontinuance, warranty nor recovery had been had;" by which it appears that discontinuance stood in equal degree with warranty or recovery. *Vide Dyer, Pasch. 4. Mar. 148. Beamont and Viller's case, and Plow. 50. b.*

Co. Lit. 365. b.
1 Co. 44. b.
3 Co. 85. b.

2. It was resolved, if Anthony had granted over his remainder in fee only, he might have entered for this forfeiture by the express purview of the act, the effect of which is; "That it shall be lawful for every person and persons, to whom the interest, title or inheritance, after the decease of the said wom. of the said manor, &c. being discontinued, aliened or suffered to be recovered in the form afores. should appertain, to enter into all and every the premises, and peaceably to possess and enjoy the same in such manner and form, as he or they should have done, if no such discontinuance, warranty nor recovery had been had nor made:" and if no discontinuance had been made, the land should descend to the issue. And therefore by the express letter of the act, he should enter on the discontinuee, and not the grantee of the remainder.

Plow. 45. a. b.
Co. Lit. 326. b.

3. It was resolved, that in this case Sir George Brown (a) should enter on the discontinuee, for if no discontinuance had been made, he should enjoy the land against the said Anthony, and all the heirs of his body; for when the (b) issue in tail levies a fine with proclamations, in the life of the tenant in tail, to another; and afterwards tenant in tail dies, this fine shall bar the tail. For the words of the statute of (c) 32 H. 8. cap. 36. are, "in any wise intailed to the person or persons so levying the same fine, or to any of the ancestor or ancestors of the same person or persons." But it was objected that the fine in the life of the wife doth operate in part by (d) conclusion; for after that the wife doth remain tenant in tail, and in part, by conveyance of an estate as to the remainder in fee; and he, who hath nothing but by conclusion or estoppel, shall not take benefit of this act, because the words are, "to whom the interest, title, or inheritance, after the decease of the said woman should appertain;" and in this case, as to the estate-tail, the wife being alive, the donee had nothing but by conclusion, and right or title of entry

(a) Moor 455.
Cr. El. 514.
2 And. 45. Cr.
Jac. 175. Hob.
258. 1 Rol. 87.
Postea 61. a.
(b) Moor 252.
3 Co. 90.
Postea 61. a. b.
1 Jones 33, 60.
461. Cr. Jac.
478, 525, 689.
9 Co. 140. b.
141. a. Godb.
316. Hut. 84.
(c) 1 Co. 96. b.
Co. Lit. 262. a.
Postea 87. a.
10 Co. 50. a.
(d) Lit. Rep.
283. 2 Bulst.
43. Cr. Jac. 175.
Antea 5. b.

(a) 2 Bulst. 45.

(b) 2 Bulst. 45.

1 Jones 33.

Cr. Jac. 175.

(c) 11 H. 7.

cap. 20.

30 Co. 37. a.

Winch 43.

1 Leon. 267.

2 Leon. 168.

3 Leon. 78.

Cr. El. 2, 24,

513, 514.

Godb. 6.

Moor 93, 250.

455. 4 Co. 3. b.

5 Co. 80. a.

2 And. 31, 44,

57. 1 Rol. 878.

Cr. Jac. 174,

474, 624.

Cr. Car. 244.

1 Jones 13, 254.

Co. Lit. 326. b.

365. b.

Hob. 166, 341.

Bridgm. 136.

(d) 2 Leon. 168.

Godb. 6.

3 Leon. 78.

2 And. 150.

Moor 250.

2 Rol. Rep. 491.

3 Keb. 436.

Cr. Jac. 689.

2 And. 57.

Cr. El. 514.

Jenk. Cent. 276.

Cr. Car. 234.

1 Jones 60.

(e) Dyer 148.

pl. 79. Co. Lit.

252. a.

1 Rol. 852.

in this case could not be given to a stranger. But it was resolved, that Sir George Brown should in this case take (a) advantage thereof; for he, who hath the immediate title, interest or inheritance at the time of the forfeiture, shall enter by force of this statute: and now by the fine with proclamations, the estate-tail was barred and (b) extinct; and against that, Anthony nor any issue heritable by force of the estate tail can enter; and by consequence he, who hath the remainder in fee, shall enter, for he is the person "to whom the interest, title and inheritance, after the decease of the said woman, do appertain." And now, on the matter, the case is no other, but that a woman tenant in tail within the statute of (c) 11 H. 7. the reversion or remainder in fee, the woman makes a discontinuance, he in the reversion or remainder shall enter for this forfeiture; for he is the person "to whom the interest, title and inheritance, after the decease of the said woman, do appertain." The same law in the case at bar, although the fine were without proclamations; yet after the death of the woman, Anthony himself, against his fine, cannot enter; but the entry of the conusee is lawful, and therefore he shall take the benefit of this act, by the express words thereof.

And it was said by Anderson, Chief Justice of the Common Pleas, that where it was invented to make evasion out of this act, that such woman tenant in tail should accept a fine *sur conusans de droit come ceo, &c.* and thereby grant and render the land for (d) 1000 years, pretending that that was not within the words of the act, *scil.* which prohibits discontinuance, alienation, release, &c. That that was an alienation within the intent of this act, or otherwise the statute would serve for little or nothing. And so was it, on conference with other Judges resolved by Wray Chief Justice, and himself in the Court of Wards, and declared accordingly. And so it was held in the Common Pleas 18 Eliz. by Sir James Dyer, Manwood and Mounson Justices, as I myself heard. *Vide* Dyer Trin. 3 & 4 Phil. & Mar. (e) 148. Penicock's Case.

[See the case of Symonds and Cudmore in Carthew, Skinner, &c. also Fermor's case, and the case of fines post.]

R I G E W A Y's Case.

Pasch. 36 Eliz.

In the King's Bench.

IN debt by William Grils, against Thomas Rigeway, late Sheriff of Devon. for 309l. 6s. 8d. which he had recovered in the same court in trespass for taking his goods, against John Chawner alias Chaundeler, and that the body of Chawner was taken in execution 20 April, 33 Eliz. by the defendant then Sheriff, at Stoke Cannon in the said county; and afterwards the defendant, 10 Decem. 34 Eliz. then Sheriff of the same county suffered him to escape in (a) *Parochia S. Mariæ de Arcubus in warda de Cheape, London, & ad largum quo voluit ire permisit, &c.* The defendant pleaded and confessed, that Chawner was taken in execution the said 20th of April 33 Eliz. and so continued in his custody till the 8th day of December following; at which day, at Stoke Cannon afores. he broke the prison, & *a custodia ipsius Th. Rigeway contra voluntatem ipsius Th. evasit, super quo præd' Thomas adtunc & ibidem recenter infecutus est præd' Johannem, & in recenti infecutione ipsius Johannis in forma præd', præd' Thomas Rigeway 11 Die Decemb. tunc proxime sequent' apud (b) Stoke Cannon præd' ratione & virtute executionis præd' & prioris captionis & executionis prædict', cepit & arrestavit præd' Johannem, &c.* The plaintiff by way of (c) replication, by protestation that the defendant did not make fresh suit, for plea said, *quod post evasionem præd' & antequam præd' Johannes Chawner recaptus fuit, idem Johannes per totum unum diem & unam noctem, viz. apud London in parochia & warda præd' fuit extra visum ipsius Thomæ, &c.* And thereupon the defendant did demur in law.

1. In this case it was unanimously agreed by the whole court, that although the prisoner who escaped be out of sight, yet if fresh suit be made, and he be retaken in *recenti infecutione*, he should be in execution; for otherwise, at the turn of a corner, or by entry into a house, or by such

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means,

Moor 660.
Cr. El. 318, 439.
Poph. 41.
Gold. 180.

(a) Doct. pl. 55.

(b) Doct. pl. 55.

(c) Poph. 41.

Cr. El. 439. 7
Moor 660.
1 Rol 901.
Kelw. 2. b.
1 Jones 145.
Litch. 200.
Pop. 41.
3 Co. 44.

3 E. 4. 6. b.
 Plowd. 37. b.
 (a) Cr. El. 555.
 Godb. 126. Cr.
 Car. 240, 255.
 1 Ro. 901.
 Hob. 60.
 Cr. El. 53,
 439. Kelw. 3. a.
 Antea 44. b.
 (b) 1 Jones 145.
 Cr. Jac. 657,
 658. Cr. El. 439.
 (c) Cr. El. 53,
 124, 264.
 Godb. 126.
 Hard. 31.
 F. N. B. 130. b.
 (d) Cr. El. 44,
 439, 555.
 Moor 660.
 Cr. Car. 240.
 Style 117.
 Cr. El. 102.
 Antea 44. b.
 1 Rol. 307.
 1 Lev. 211.
 1 Show. 177.
 Lutw. 1266.
 1 Mod. 194.
 Com. b. 390.
 (e) Poph. 42.
 Doct. pl. 55.
 (f) 1 Sand. 285.
 8 Co. 120. b.
 133. b. 163. a.
 Hob. 199.
 Cr. Car. 5.
 Cr. Jac. 133,
 221, 312.
 2 Bulst. 94.
 Style 354.
 Palm. 287.
 Lit. R. 172.
 (g) Cr. El. 318.
 Cr. Jac. 127.
 Moor 461.
 Poph. 42.
 1 Ro. R. 271.
 2 Bulst. 37.
 9 H. 6. 35. b.
 Fitz. Repleader
 8. Br. Repleader
 39. Moor 867.
 Doct. pl. 311.
 1 And. 168.
 1 Ro. Rep. 363.
 Lit. R. 252.
 (b) 8 Co. 120. b.
 Cr. El. 62. 8 Co. 120. b. 1 Leon. 342. 35 H. 6. 19. a. con. see 1 Leo. 79. 3 Blackst. Com.
 cap. 19. fol. 290. cap. 9. 163. cap. 26, 415. See the table to Strange's Reports tit. Escape. Hardw.
 310, 311.

means the prisoner might be out of sight; and although the prisoner flieth into other counties where the Sheriff hath no power, and where it may be objected, the Sheriff cannot have the custody of him; yet forasmuch as the escape was of his (a) own wrong, (whereof he shall not take advantage) the Sheriff might on fresh suit take him in any other county, and he should be said in execution. But if the plaintiff bring an action against the Sheriff for an escape (b) before that the Sheriff can retake him; or if the Sheriff doth not make fresh suit; yet in both these cases the Sheriff may retake (c) him, and keep his body under his custody, till he hath agreed with him, or may have an action on the case for his tortious escape. And although the defendant be taken on a *capias ad satisfaciendum*, and escapes, yet if the writ be never returned and filed, the plaintiff may have a new *capias ad satisfaciendum* against him, and take him again, and he shall not take advantage of his own wrong; but if the plaintiff will, he may charge the Sheriff for the escape, if he hath not retaken him on fresh suit before the action brought: and when the prisoner escapes of his own wrong, and is retaken, he shall never have an (d) *audita querela* against the Sheriff. But otherwise it is, when he escapes with the consent of the Gaoler, for then he cannot retake him; and in such case for his discharge he shall have an *audita querela*. And on these differences are all the books, *scil.* 8 E. 2. Corone 40. 6 E. 2. Escape Br. 49. 41 Aff. 15 45 E. 3. 9. 2 E. 4. 6. 10 E. 4. 10. 11 E. 4. 4. 13 E. 4. 8. 21 E. 4. 67. 6 H. 7. 11. 10 H. 7. 25. 28. 13 H. 7. 2. 14 H. 7. 1. 16 H. 7. 2. 12 H. 8. 90. Br. Escape 45. Plow. Com. 36. Plat's Case F. N. B. 130. b. 10 Eliz. Dyer 275.

2. It was resolved, that the bar was (e) insufficient, for the plaintiff hath declared of an escape in London, and the defendant justifieth the retaking of him at Stoke Cannon, and so the escape at London is not answered; but forasmuch as the plaintiff not denying the fresh suit, but by protestation hath only relied upon that matter, that the prisoner was out of his sight, the court will not intend other matter to maintain his action, than he himself hath shewed; and now on (f) the whole record it doth not appear to the court, that the plaintiff hath cause of action, wherefore the plaintiff perceiving the opinion of the court, did discontinue his suit: but it was agreed, that if the plaintiff had demurred upon the bar, he should have had judgment.

3. It was resolved, that after demurrer there should be no repleading; for the parties have by their mutual assent put themselves upon the judgment of the court, and therefore without their assent they could not replead. And so was it adjudged in debt between (g) Kendal and (b) Heyer in the King's Bench, Mich. 25 & 26 El. by Wray Chief Justice, Sir Thomas Gawdy, and the whole court of the King's Bench. And in the same court in debt between Gallis and Burbry, Mich. 29 & 30 El. against the opinion of 9 H. 6. 35. in an avowry, which record had been, seen and did not warrant the report of the Book.

LINCOLN COLLEGE's Case.

Michaelmas Term, 37 & 38 Eliz. in
C. B. Rot. 82.

ROBERT CHAMBERLAIN, Esq. by Apollo Plaine his Formedon;
attorney, demandeth against the warden or rector and
scholars of the Blessed Mary and All Saints Lincoln in the
university of Oxford the manors of Pettesho and Eckney, with
the appurtenances, except 120 acres of pasture in Pettesho
afores. and 30 acres of pasture in Eckney afores. which Al-
vered Cornburgh, Esq. Richard Danvers, Esq. Nicholas Sta-
thum and William Callow gave to Richard Chamberlain, Esq.
and Sibil Fowler, and the heirs males of the body of the said
Richard Chamberlain begotten; and which after the death of
the said Richard and Sibil, and of Edward son and heir of the
said Richard Chamberlain, and of Leonard son and heir of
the said Edward, and of Francis son and heir of the said
Leonard, to the afores. Robert son and heir of the said Francis,
ought to descend by the form of the gift aforesaid, &c. Where-
upon he saith, that the afores. Alvered Cornburgh, Richard
Danvers, Nicholas and William gave the manors afores. with
the appurtenances, to the afores. Richard Chamberlain and
Sibil, and to the heirs males of the body of the said Richard
Chamberlain begotten, in the form afores. &c. By which gift
the said Richard and Sibil were seised of the said manors, with
the appurtenances, that is to say, the said Richard in his de-
mesne as of fee and right, and the said Sibil in her demesne
as of freehold, by the form, &c. In the time of peace in the
time of the Lord Edward late King of England (the 4th of
that name after the conquest) by taking the profits thereof
to the value, &c. And from him the said Richard the right
descended by the form, &c. to one Edward, as son and heir,
&c. And from him the said Edward the right descended
by

Plead. in the C. of LINCOLN COLLEGE. Part III.

Plea.

by the form, &c. to one Leonard, as son and heir, &c. And from him the said Leonard the right descended by the form, &c. to one Francis, as son and heir, &c. And from the said Francis, son of the said Leonard, the right descended by the form, &c. to this Robert who now demandeth as son and heir, &c. And which after the death, &c. And thereupon he bringeth suit, &c. And the aforesaid warden, or rector, and scholars, by William Plaine their attorney come and defend their right when, &c. and say, that the afores. Robert Chamberlain, ought not to have his action afores. against them because protesting that the afores. Alvered Cornburgh, Richard Danvers, Nicholas Stathum, and William Callow, did not give the manors afores. with the appurtenances, to the afores. Richard Chamberlain and Sibil Fowler, in manner and form as in the declaration afores. is alledged; for plea they say, that long after the time when the gift afores. is supposed to be made, Richard Lyfter, Gent. Martin Linsey, John Cottesford, John Clayton, William Hogeson, and Robert Taylor Clerks were seised of the manors afores. with the appurtenances in their demesne as of fee; and being so seised thereof, the afores. Sibil, the mother of the great grandfather of the said Robert Chamberlain, whose heir the same Robert is, on the 5th day of May in the 11th year of the reign of the Lord Henry the 8th late King of England, at Petteho afores. by her certain writing of release, which the said warden or rector, and scholars sealed with the seal of the afores. Sibil bring here into court, the date whereof is the same day and year, remised, released, and altogether for her and her heirs for ever quit claimed to the afores. Richard Lyfter, Martin Linsey, John Cottesford, John Clayton, William Hogeson, and Robert Taylor, then of the manors afores. with the appurtenances in form afores. being seised in their full and peaceable possession then being to their heirs and assigns for ever, all her right, claim, title, estate, use, interest, and demand, which ever she had, then had, or at any time after might have, of and in the manors aforesaid, with the appurtenances: and further, the said Sibil, by her afores. writing, granted for her and her heirs, that she the said Sibil, and her heirs, would warrant and for ever defend the manors afores. with the appurtenances, to the said Richard Lyfter, Martin Linsey, John Cottesford, John Clayton, William Hogeson, and Robert Taylor, their heirs and assigns, against the then Abbot of Westminster and his successors, as by the said writing of release more fully appeareth: and this the said warden, or rector, and scholars are ready to verifie: whereupon they pray judgment, if the aforesaid Robert Chamberlain, ought to have his said action against them, contrary to the aforesaid writing of release, the said
warranty

warranty of the said Sibil his ancestor, whose heir the said Robert is in it contained, &c. And the afores. Rob. Chamberlain saith, that he by any thing before alledged, ought not to be barred from having his action afores. because he saith, that long before the afores. gift made, and before the afores. Alvered, Richard Danvers, Nicholas Stathum, and William Callow, had any thing in the manors afores. with the appurtenances, the aforesaid Richard Chamberlain was seised of the afores. manors with the appurtenances in his demesne as of fee, and the said Rich. being so seised thereof, before the gift afores. that is to say, on the 12th day of June in the 11th year of the reign of the Lord Edward the 4th late King of England, (after the Conquest,) the afores. Richard Danvers, Alvered Cornburgh, Nicholas Stathum, and William Callow, obtained and prosecuted, out of the court of the Chancery of the said late K. Edward the 4th, (at Westminster in the county of Middlesex then being,) a certain writ of right of the said late King Edward the 4th, against the said Rich. Chamberlain then being tenant of the freehold, of the manors afores. with the appurtenances, (amongst other things,) directed to the then Sheriff of the county of Buckingham: by which said writ, the said late King then commanded the said Sheriff, that he should command the said Richard Chamberlain, by the name of Richard Chamberlain, Esq. that justly, and without delay, he should render to the said Richard Danvers, Alvered, Nicholas and William, by the names of Richard Danvers, Alvered Cornburgh, Esq. Nicholas Stathum, and William Callow, the manors afores. with the appurtenances, (amongst other things) by the names of the manors of Pettesho and Eckney, with the appurtenances, and 6 messuages, 200 acres of land, 20 acres of meadow, 200 acres of pasture, and 100s. rent, with the appurtenances in Pettesho, Eckney and Emberton, which he claimed to be his right and inheritance: and whereupon they complained that the said Richard Chamberlain them unjustly deforced, and unless he should so do, and if the afores. Richard Danver, Alvered, Nicholas and William Callow, should make him the said then Sheriff secure to prosecute their claim, then he should summon by good summoners the afores. Richard Chamberlain, that he should be before the then Justices of the said late King Edward the 4th here, that is to say, at Westminster aforesaid, from the day of St. John the Baptist in 15 days then next following, to shew wherefore he would not do it and that he should have then here the summoners and that writ; because Thomas Rokes, Esq. Chief Lord of the same fee, thereupon remised his court to the said late King Edward the 4th. At which said 15 days of John the

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the Baptift, before Thomas Brian, Knt. and his companions, then Juftices of the faid late King Edward the 4th of the Bench here, that is to fay at Weftminfter aforef. came as well the aforef. Richard Danvers, Alvered, Nicholas Stathum, and William Callow, by Thomas Gurney their attorney, as the aforef. Richard Chamberlain, by John Wideftale then his attorney, and the then Sheriff of the aforefaid county of Buckingham, that is to fay, Reginald Gray, Efq. then there returned the writ aforef. to him in form aforef. directed in all things ferved and executed, and fent, [i. e. returned] that the aforef. Richard Danvers, Alvered, Nicholas, and William Callow, had found to the faid then Sheriff fureties to profecute his writ aforef. that is to fay, Richard Doe and John Roe; and that the faid Richard Chamberlain was fummoned by James Tye and John Baker good fummoners, &c. And hereupon the faid Richard Danvers, Alvered, Nicholas Stathum, and William Callow, by the faid Thomas Gurney their attorney, in the faid court of the aforef. late King Edward the 4th of the Bench here, that is to fay, at Weftminfter aforef. at the 15 days aforef. of St. John Baptift by declaring againft the faid Richard Chamberlain, of and upon their writ aforef. by the fame Thomas Gurney their attorney, demanded againft the aforef. Richard Chamberlain, the manors, tenements, and rent aforef. with the appurtenances, in the faid writ of right fpecified, as their right and inheritance, by the aforef. writ of the faid late King Edward the 4th; becaufe the aforef. Thomas Rokes, Chief Lord of the fame fee, thereupon remifed his court to the faid late King: and whereupon then they faid, that they themfelves were feifed of the manors, tenements, and rent aforef. with the appurtenances, in the faid writ of right fpecified, in their demefne as of fee and right, in the time of peace, in the time of the faid late King Edward the 4th, by taking the profits thereof to the value, &c. and that fuch was their right, they then did offer, &c. And the aforef. Rich. Chamberlain by the aforef. John Wideftale his attorney, came and defended the right of the faid Rich. Danvers, Alvered, Nicholas, and William, when, &c. And their feifin, of whose feifin, &c. as of fee and right, &c. And the whole, &c. And moftly of the manors, tenements, and rents aforef. with the appurtenances, in the faid writ of right fpecified, and then vouched thereof to warranty Rob. King, who was then prefent in the fame court in his proper perfon, and freely warranted to them the manors, tenements and rent aforef. with the appurtenances, in the faid writ of right fpecified, &c. Whereupon the aforef. Richard Danvers, Alvered, Nicholas, and William

William then demanded against the aforef. Robert, tenant by his warranty, the manors, tenements, and rent aforef. in the faid writ of right specified, in form aforef. &c. And whereupon then they faid, that they themselves were feised of the manors, tenements, and rent aforef. with the appurten. in their demefne as of fee and right, in the time of peace, in the time of the faid late King Edw. the 4th, by taking the profits thereof to the value, &c. And that fuch was their right, they then offered, &c. And the aforef. Robert, tenant by his warranty aforef. defended the right of the faid Richard Danvers, Alvered, Nicholas, and William, when, &c. and their feisin, of whose feisin, &c. as of fee and right; and the whole, &c. and mostly of the manors, tenements, and rent aforef. with the appurtenances in the faid writ of right specified; and then put himself on the grand affize of the faid late King Edward the 4th, and then prayed a recognition to be made whether he more right then had to hold the manors, tenements and rent aforefaid, with the appurtenances to him and his heirs as tenant thereof by his warranty as he then held them or the aforef. Richard Danvers, Alvered, Nicholas, and William, to have the manors, tenements and rent aforef. with the appurtenances, in the writ of right specified, as they above demanded, them, &c. And the aforef. Rich. Danvers, Alvered, Nicholas, and William then came again in the fame court, in the fame term of the Holy Trinity in the 11th year of the reign of the faid late King Edward the 4th (after the Conquest) by their then attorney aforef. and the aforef. Robert being then solemnly called, did not come again, but departed in contempt of the court, and made default; wherefore it was then considered by the fame court, that the aforef. Rich. Danvers, Alvered, Nicholas, and William, should recover their feisin, against the aforef. Rich. Chamberlain, of the manors, tenements, and rent aforef. with the appurtenances in the faid writ of right specified, to hold to them and their heirs quietly from the aforef. Rich. Chamberlain and his heirs, and also from the faid Robert and his heirs for ever; and that the aforef. Rich. Chamberlain, then should have of the lands of the faid Robert to the value, &c. And that the faid Robert should then be in mercy, &c. as by the record and process thereof here in court remaining, it manifestly appeareth. Which faid recovery in form aforef. had, was had to the use and intent, that the aforef. Alvered, Richard Danvers, Nicholas Stathum and William Callow, should give the manors aforef. with the appurtenances, to the aforef. Richard Chamberlain, and Sibil, and the heirs males of the body of the faid Richard Chamberlain issuing: by virtue of which recovery,

covery, the afores. Alvered, Rich. Danvers, Nicholas and William Callow, entered into the manors and tenements afores. with the appurtenances, and were seised thereof in their demesne as of fee, to the use and intent afores. and being so seised thereof to the use and intent afores. the said Alvered, Rich. Danvers, William Stathum, and William Callow, gave the afores. manors with the appurtenances, to the afores. Rich. Chamberlain and Sibil by the names of Rich. Chamberlain, Esq. and Sibil Fowler, and the heirs male of the body of him the said Rich. Chamberlain issuing, as the said Rob. Chamberlain, by his writ and declaration afores. above supposeth: by which gift the afores. Rich. Chamberlain and Sibil were seised of the manors afores. with the appurtenances, that is to say, the said Rich. Chamberlain, in his demesne as of fee tail, that is to say, to him and the heirs males of his body issuing, and the afores. Sibil, in her demesne as of freehold, for the term of her life, by the form of the gift aforesaid: and afterwards the said Rich. Chamberlain, at Pettesho afores. took to wife the afores. Sibil; the mother of the great grandfather of the afores. Rob. Chamberlain, and had issue male of his body issuing, the afores. Edw. Chamberlain, and afterwards the said Rich. Chamberlain at Pettesho afores. died, and the afores. Sibil him survived, and held herself *in* in the manors afores. with the appurtenances, and was thereof sole seised in her demesne as of freehold; for the term of her life by right of survivor, &c. by the form of the gift aforesaid; and afterwards the said Sibil by her afores. writing of release remised, and released to the afores. Rich. Lyster, Martin Linsey, John Cottessford, John Clayton, and William Hogeson, and Rob. Taylor, all her right, claim, title, estate, use, interest, and demand, of and in the manors afores. with the appurtenances, in manner and form as in the afores. bar above is specified; and that afterwards the said Sibil at Pettesho afores. died: and from the afores. Richard the right descended by the form, &c. to the afores. Edward, as son and heir, &c. And from the said Ed. the right descended by the form, &c. to the afores. Leonard, as son and heir, &c. And from the afores. Leonard the right descended by the form, &c. to the afores. Francis, as son and heir, &c. And from the said Francis the right descended by the form, &c. to the said Robert, who now demandeth as son and heir, &c. as he by his writ and declaration afores. supposeth: and this he is ready to verifie. Wherefore, forasmuch as by force of a certain act of parliament made in the parliament of the late King Henry the 7th, at Westm. afores. in

in the county of Middlesex afores. holden in the 11th year of his reign, the afores. warranty of the afores. Sibil, in form afores. made is altogether void and of no effect in law; he prays judgment and his seisin of the manors afores. with the appurtenances, to be to him adjudged: and the afores. warden, or rector, and scholars say, that by the afores. act made in the afores. parliament of the late K. Henry the 7th, at Westm. afores. holden in the 11th year of his reign afores. it is provided, that the act afores. should not extend to any such recovery or discontinuance to be had when the heir next inheritable to such woman, or he or they who next after the death of the said woman, had or should have the estate of inheritance in the said manors, lands and tenements, should be assenting or agreeing to the afores. recoveries, where the same assent and agreem. are of record or inrolled, as by the said act (amongst other things) it appeareth: and the said warden, or rector, and scholars further say, that before the making of the said writing of release of the afores. Sibil, and after the death of the afores. Rich. Chamberlain, Nicholas Evan, Clerk, and Thomas Hartop, Clerk, on the 2d day of June in the 4th year of the reign of the said late King Henry 8th, after the Conquest, out of the court of the Chancery of the said late King then being at Westminster afores. sued forth an original writ of the said late King of entry upon disseisin in the post, against the afores. Edward Chamberlain, of the manors afores. with the appurtenances directed to the then Sheriff of the county of Buckingham, the said Edward then being tenant of the freehold of the said manors with the appurtenances; by which writ the said late K. commanded the said then Sheriff, that the said Sheriff should command the said Edw. Chamberlain, by the name of Edward Chamberlain, Esq. that justly and without delay he should render to the afores. Nicholas Evan and Thomas Hartop Clerks, the manors afores. with the appurtenances amongst other things) by the names of the manors of Pettesho and Eckney with the appurtenances, and of 6 messuages, 200 acres of land, 20 acres of meadow, 200 acres of pasture, and 100 shillings of rent, with the appurtenances in Pettesho, Eckney and Emberton, which the said Nicholas and Thomas then claimed to be their right and inheritance, and into which the said Edw. Chamberlain had not entry, but after the disseisin which Hugh Hunt thereof unjustly, and without judgment did to the afores. Nicholas Evan and Thomas Hartop, after the first passage of the lord King Henry, son of King John, into Gascoign, as they said, and whereupon they complained, that the said Edw. Chamberlain did them disseise; and unless he should so do, and the aforesaid Nicholas,
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and Thomas Hartop should secure him the said Sheriff to prosecute their claim; then that he should summon by good summoners the aforef. Edw. Chamberlain, that he should be before the Justices of the said late K. Henry the 8th here, that is to say, at Westminster aforef. on the morrow of St. John the Baptist then next following, to shew why he did not do it; and that he have then here the summoners and that writ. At which said morrow of St. John the Baptist, before Rob. Read, Knt. and his companions, then Justices of the said late King Henry the 8th of the Bench here, that is to say, at Westminster aforef. came as well the aforef. Nicholas Evan and Tho. Hartop, by John Cowper then their attorney, as the aforef. Edw. Chamberlain, by Thomas Palmer then his attorney. And the Sheriff, that is to say, Ralph Verney, Esq. then returned here the writ aforef. in all things served and executed, that is to say, that the aforef. Nicholas and Thomas, had found to the then Sheriff sureties to prosecute his suit aforef. that is to say, John Doe and Richard Roe; and that the aforef. Edw. Chamberlain was summoned by John Den and Rich. Fen: and upon this the said Nicholas Evan and Tho. Hartop, by declaring against the said Edw. Chamberlain, upon the writ aforef. demanded against the said Edw. Chamberlain the manors, tenements and rent aforef. with the appurtenances, as their right and inheritance, and into which the said Edw. Chamberlain had not entry, but after the first passage of the Lord King Henry, son of King John, into Gascoign, &c. And whereupon then they said that they themselves were seised of the manors, tenements and rent aforef. with the appurtenances, in their demesne as of fee and right, in time of peace, in the time of the said late King Henry the 8th, by taking the profits thereof to the value, &c. and into which, &c. And thereof then they brought suit, &c. And the aforef. Ed. Chamberlain, by the aforef. Tho. Palmer his attorney, then defended his right, when, &c. and then vouched thereof to warranty Tho. Fish, who was then present in court in his proper person, and freely warranted to him the manors, tenements and rent aforef. with the appurtenances, and thereupon, the said Nich. Evan and Tho. Hartop demanded against him the said Tho. Fish, then tenant by his warranty, the manors, tenements and rent aforef. with the appurtenances in form aforef. &c. And whereupon they then said, that they were seised of the manors, tenements and rent aforef. with the appurtenances, (amongst other things) in their demesne as of fee and right, in time of peace, in the time of the aforef. late King Henry the 8th by taking the profits thereof to the value,

value, &c. and into which, &c. and thereof they then brought suit, &c. And the aforef. Tho. Fish, tenant by his warranty aforef. then defended his right, when, &c. and then prayed licence thereof to imparl, and he had it, &c. And afterwards, in the very same term, the aforef. Nich. Evan and Tho. Hartop returned again here into the court aforef. of the said late K. Henry the 8th, by their attorney aforef. and the aforef. Tho. Fish, tenant by his warranty aforef. although solemnly required, did not return again, but departed in contempt of the court and made default; therefore then it was considered by the aforef. court here, that the aforef. Nich. Evan and Tho. Hartop should recover their seisin against the said Edward Chamberlain, of the manors, tenements and rent aforef. with the appurtenances, and that the said Edward should have of the lands of the aforef. Tho. Fish, to the value, &c. and that the said Tho. Fish should be in mercy, &c. as by the record and process thereof here in court remaining more fully appeareth. Which recovery, in form aforef. had, was had to the use and to the intent, that the aforef. Nich. Evan and Tho. Hartop, should enfeof the aforef. Rich. Lyfter, Martin, John Cottesford, John Clayton, William Hogeson and Robert Taylor of the manors aforef. with the appurtenances, to have and to hold to them and their heirs for ever: by virtue of which said recovery, the aforef. Nich. Evan and Tho. Hartop entered into the manors aforef. with the appurtenances and were seised thereof in their demesne as of fee; and being so seised thereof the said Nich. and Tho. Hartop, did infeof the aforef. Richard Lyfter, Martin Linsey, John Cottesford, John Clayton, William Hogeson and Robert Taylor of the said manors with the appurtenances to have and to hold to them and their heirs for ever: by virtue of which feoffment the said Richard Lyfter, Martin, John Cottesford, John Clayton, William Hogeson and Rob. Taylor were seised of the same manors with the appurtenances, in their demesne as of fee; and being so seised thereof, the aforef. Sibil, in the life of the said Edward, for the better security of the said Rich. Lyfter, Martin, John Cottesford, John Clayton, William Hogeson and Rob. Taylor, in the manors aforef. with the appurtenances, according to agreement between the same Edward and Sibil, first before the aforef. recovery had, by her writing aforef. of release remised, and released to the aforef. Richard Lyfter, Martin, John Cottesford, John Clayton, William Hogeson and Rob. Taylor, all her right, claim, title, estate, use, interest, and demand of and in the manors aforef. with the appurtenances in manner and form as they have above al-

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ledged; and this they are ready to verifie: whereupon they pray judgment; and that the said Rob. Chamberlain, may be barred from having his action afores. against them, &c. And the afores. Rob. Chamberlain, protesting that the recovery afores. was not had to the use and intent, that the afores. Nich. Evan and Tho. Hartop should infeoff the said Rich. Lyfter, Martin, John Cottesford, John Clayton, William Hogeson and Rob. Taylor of the manors afores. with the appurtenances; protesting also, that the afores. Nich. Evan and Tho. Hartop did not infeoff the afores. Rich. Lyfter, Martin, John Cottesford, John Clayton, William Hogeson and Rob. Taylor, of the manor afores. with the appurtenances; by protesting also, that the afores. Sibil, for the better security of the afores. Rich. Lyfter, Martin, John Cottesford, John Clayton, William Hogeson and Rob. Taylor, in the manors afores. with the appurtenances, according to agreement between them the said Edward and Sibil, first before the afores. recovery above supposed to be had, by her writing of release afores. did not remise and release to the afores. Rich. Lyfter, Martin, John Cottesford, John Clayton, Will. Hogeson and Rob. Taylor, as the afores. warden or rector and scholars above in their rejoinder have alledged; protesting also, that the afores. Edw. Chamberlain, on the day of the obtaining of the original writ of the said Nich. Evan and Tho. Hartop, out of the court of Chancery of the afores. late K. Henry the 8th, that is to say, the 2d day of June in the 4th year of the reign of the same late K. or ever after was not tenant of the freehold of the manors afores. with the appurtenances: for plea, the said Rob. Chamberlain saith, that the afores. plea of the afores. warden or rector and scholars, above by rejoinder pleaded, is not sufficient in law to bar him the said Rob. from having his action afores. against the afores. warden or rector and scholars, as well for that, that the said rejoinder is a departure from the afores. bar of them the warden or rector and scholars, as for want of sufficient matter in the said rejoinder contained; and this he is ready to verifie: wherefore, for want of a sufficient rejoinder of the said warden or rector and scholars, in this behalf, the said Rob. Chamberlain, as before, prays judgment and seisin of the manors afores. with the appurtenances to be adjudged to him, &c. And the said warden or rector and scholars, in as much as they above by rejoining have alledged sufficient matter in law to bar the aforesaid Robert from having his action aforesaid against them the warden or rector and scholars, which they are ready to verifie: which said matter the

the afores. Robert doth not deny, nor to the same any ways answereth, but to admit that averment doth altogether refuse, as before prays judgment, and that the afores. Rob. Chamberlain may be barred from having his action afores. &c. And because the Justices here will advise themselves of and upon the premises, before they give their judgment thereof, day is given to the parties afores. here, until in 8 days of St. Hilary, to hear their judgment thereof, because that the said Justices here thereof are not yet, &c. At which day come here as well the afores. Robert, as the afores. warden or rector and scholars, by their attornies aforesaid: and because the Justices here will further advise themselves of and upon the premises, before they give their judgment thereof, day further is given to the parties afores. here until from the day of Easter in 15 days, to hear their judgment thereof, because the said Justices here thereof are not yet, &c. At which day here come as well the afores. Robert, as the said warden or rector and scholars, by their attornies afores. And because the Justices here will further advise themselves of and upon the premises, before they give their judgment thereof, further day is given to the parties afores. here, until in the morrow of the Holy Trinity, to hear their judgment thereof, because the said Justices here thereof are not yet, &c. At which day here come as well the afores. Robert, as the afores. warden or rector and scholars by their attornies aforesaid: and because the Justices here will further advise themselves of and upon the premises, before they give their judgment thereof, further day is given to the parties afores. here, until in 8 days of St. Michael, to hear their judgment thereof, because the same Justices here thereof are not yet, &c. At which day here come as well the afores. Robert, as the afores. warden or rector and scholars, by their attornies afores. and upon this, the premises being seen, and by the Justices here fully understood, it seemeth to the same Justices here, that the plea of the afores. warden or rector and scholars, above by rejoinder pleaded, is sufficient in law to bar the said Robert from having his action afores. against the afores. warden or rector and scholars: therefore it is considered, that the afores. Robert take nothing by his writ afores. but that he be in mercy for his false clamour; and that the afores. warden or rector and scholars may go thereof without day, &c.

Judgment,
Nota bene,

 LINCOLN COLLEGE's Case.

Mich. 37 & 38 Eliz.

In the Common Pleas. Rot. 82.

2 And. 31. Moor
255.Co. Lit. 326. b.
365. b.Co. Lit. 72. a.
303. b.

IN a *formedon* in descender by Rob. Chamberlain, cousin and heir male of the body of Rich. Chamberlain, against the rector and scholars of Lincoln College in the university of Oxford for the manors of Petfore and Eckeney in the county of Buckingham: on the pleading the case was such: Rich. Chamberlain did enfeof Corneborough and others of the said manors, to the intent that they should give back the same to the said Rich. Chamberlain and Sibil Fowler whom he intended to marry, and to the heirs male of the body of Richard, which was done accordingly. Richard and Sibil intermarried and had issue Edward; Rich. died, Edw. in the life of Sibil *ad tunc tenens liberi tenementi, &c.* (which was intended by disseisin) *an.* 4 H. 8. suffered a common recovery with single voucher by agreement amongst other things, to the intent that the recoverors should enfeof Lister and others to divers uses; and that Sibil (for better assurance) should release to them with warranty; which feoffment and release with warranty were made accordingly *an.* 11 H. 8. And afterwards Sibil died Edw. then being alive; and whether this collateral warranty should bar the demandant or not, or should be void by the stat. of 11 H. 7. cap. 20. was the question; for in as much as the common recovery was had against Edward in the life of tenant for life, it cannot be intended, that Sibil had surrendered her estate, or that Edw. had entered for a forfeiture, and thereby seised by force of the tail, unless it had been alledged in pleading: but for as much as it was generally alledged that then he was tenant of the freehold, it shall be intended more strong against him who

who (a) pleads it, that is to say, that it was by disseisin, or by feoffment of a disseisor, so that he was in of another estate, and then the recovery with (b) single voucher will not bind it: and therefore the sole question was, on the collateral warranty. And it was strongly objected, that this warranty should be void, not only within the express letter, but also within the meaning of the act.

For first, there is no doubt but the heir male of the body of Edward is a person to whom the inheritance, after the death of Sibil, shall appertain: and the words of the act are, that such person shall enter, and peaceably possess the land as he ought if no such warranty had been made. And the meaning of the act was not to save the estate-tail, for him only who is heir apparent at the time of the forfeiture, but to preserve it for the benefit of all the issues inheritable by force of the tail. As if A. makes a feoffment in fee to the use of himself and his wife, and to the heirs of the body of A. A. hath issue B. and dies, the wife is disseised, the heir in tail by deed releases to the disseisor, and afterwards the wife releases also with warranty and dies, B. hath issue C. and dies; although B. hath by his release disabled himself to take advantage of the forfeiture during his life, yet it shall not prejudice his issue; for he is the person to whom the inheritance of the estate tail doth appertain, and now by the statute he shall enter as if no warranty had been made.

2. It is to be observed, that by the statute, not only entry is given to him to whom the interest, title, or inheritance shall appertain, as if no warranty had been made; but by the branch next before, it is provided that every (c) discontinuance, alienation, release, or confirmation with warranty, and recovery made or suffered by such woman shall be utterly void and of none effect: and if the warranty in this case, by the express letter of the act, be utterly void and of none effect, it is void as to all, and by consequence against every issue in tail, and it is void also as to Edward himself, but in respect of the said recovery he hath barred himself that he cannot enter into the land; and the opinion of Doctor and Student was strongly urged, that if a (d) woman, tenant in tail, suffers a common recovery, and the issue in tail releases to the recoveror, yet his issue may enter; which proves, that although he, who hath the immediate right to the estate-tail, will, by his own act, exclude himself from the benefit that the stat. would have given him; yet his issue shall not be prejudiced by it.

And it was further objected, that if any (e) error had been in the recovery that Edward suffered, and he had brought a writ of error, the collateral warranty of the woman would not be a bar to him, for the statute by express words hath

(a) Co. Lit. 303.
b. Cr. Car. 50.
1 Co. 46. a.
3 Co. 5. b.
(b) 2 Rolle's 294.
395. Yelv. 51.

(c) Co. Lit. 366.
b. 325. b.
Antea 50. b.

(d) Postea 61. a.
Dr. & Stud.
lib. 1. cap. 31.
Q. Lucas 124.

(e) Postea 61. a.

made the warranty utterly void, and of no effect; *a fortiori* the warranty shall not bind the demandant, who claims as cousin and heir male of his body *per formam doni*. To which it was answered and resolved, as to the first branch, that the office of a good expofiter of an act of parliament is to make construction (a) on all the parts together, and not of one part only by itself; *nemo enim aliquam partem recte intelligere possit, antequam totum iterum atque iterum perlegerit*: and although the first branch makes the discontinuance, alienation, warranty, and recovery, utterly void, and of no effect; yet the clause following being connected to it with this conjunction, "and" "that it shall be lawful," expounds the generality of the words of the precedent branch; and therefore the (b) sense of both together is, that they shall be utterly void and of no effect by the entry of him to whom the interest, title, or inheritance, after the woman, doth appertain; but the discontinuance, alienation, warranty, or recovery, are not void between the parties, but stand in force between themselves, and against all others, but only against such to whom the interest, title, or inheritance, after the death of such woman doth appertain, and they only can make it void and of no effect by their entry: and so before this time have other statutes been expounded by the ancient judges and sages of the law. As the statute of (c) 8 H. 6. cap. 10. by which it is provided, that all outlawries shall be held for null and void, and that the party, &c. be not damaged nor put to loss of his goods and chattels, &c. unless a *capias* be awarded against the party in the county, in which, by the indictment or appeal, he is expressed to be dwelling; yet it ought to be avoided by the means which the law hath appointed, and that is by writ of error.

In the same manner in the case at bar, estates of freehold or inheritance cannot be defeated without an entry, and therefore by entry they ought to be made void. So the statute of (d) 23 H. 6. cap. 10. makes an obligation, taken in other manner than the statute prescribes, void; yet it is held in (e) 7 E. 4. 5. b. that the party cannot plead, (f) *non est factum*, but it is voidable by plea, with such apt conclusion as the law doth appoint. So on the stat. of (g) 1 Eliz. which provides, that all grants, leases, &c. made by bishops in other manner than is mentioned in the act shall be utterly void, and of no effect to all intents and purposes: notwithstanding these precise words, it was adjudged in the Common Pleas, M. 32 & 33 Eliz. in a *quare impedit* between (h) Sale and the bishop of Coventry and Litchfield, that a grant of the next avoidance of an advowson,

(a) 2 Co. 55. a. Godb. 324. Co. Lit. 381. a. 5 Co. 99. a. (b) 5 Co. 5. a. (c) March 84. 3 Inst. 31. 4 Inst. 51. Kelw. 21. b. (d) 10 Co. 99. b. Hard. 121. Cr. Car. 287. 309, 361, 448. Hob. 13. Cr. El. 66, 76, 178. 190, 199, 200, 271, 800. Dyer 25. pl. 157, 118. pl. 1. 119. pl. 1, 2, 3, 4. 324. pl. 32, 33. 364. pl. 29. Styl. 234. 2 Bulst. 13, 213. 37 H. 6. 1. a. Fitz. Obligat. 4. Br. Obligat. 37. Plowd. 62. b. 63. a. 65. a. Rastal Sher. 25. 1 Leon. 132. 2 Leon. 78, 107, 118. 3 Leon. 228. 1 Rolle's Rep. 40, 169. 2 Rolle's Rep. 201. Sav. 81. Latch. 23, 54, 55, 143. O. Benl. 110. 1 Jones 65. Hut. 70. 3 Inst. 194. 1 Rolle's 537. Moor 237. Owen 90. Godb. 136. Goldsb. 54, 66. 1 Keb. 391. Noy 33, 76, 172, 173. 3 Keb. 191. 1 An. 267. 2 And. 122. 1 Sand. 161, 162. Hetly 25, 175. F. N. B. 251. b. 9 Co. 119. b. Hetl. 23. (e) Br. non est factum 14. 10 Co. 100. b. Plowd. 66. b. 68. a. Fitz. det. 80. 5 Co. 119. b. Dyer 120. pl. 8. (f) Heb. 72. 166. 5 Co. 119. Doct. pl. 262. Br. non est factum 14. (g) Co. Lit. 45. a. Winch 47. Moor 107, 108, 109. Degg. 109, 180, 111. Cr. El. 141. 1 Leon. 59. 5 Co. 2. a. 1 And. 65, 193. Moor 253. Bridge 29, 30. (h) 10 Co. 59. a. Cr. El. 141, 207. 2 Rolle's 350. Sav. 94, 95. Owen 99. 1 And. 241, 242, 243, 244.

which

which is not warranted by the said act, is not void as to the grantor himself, but as to the successor; for so was the intent of the act, to provide for the successor and not for the party himself. So, and on the same reason it was resolved in the Common Pleas, *per totam curiam*, Pasch. 39 Eliz. between Hunt and (a) Singleton for a house in Foster-lane in London, whereof the inheritance was in the Dean and Chapter of Paul's, that if the Dean and Chapter make a lease not warranted by the statutes of 13 & 14 Eliz. in which case it is provided by the said acts, that such lease shall be absolutely void, and of no effect to all intents and purposes; in this case of a corporation aggregate of many persons, which never dies, it was greatly doubted, if the lease should not be utterly void presently according to the express letter of the act; but it was at last resolved, forasmuch as the act was made for the benefit of the successors, that the lease should not be void 'till after the death of the Dean, who was party to the lease: and although the successor of the Dean is not successor to the whole corporation who made the lease, but only the principal member of it; yet because the whole corporation never (b) dies, such lease, by construction, shall be void after the death of the Dean, who is the principal member of the corporation, and his successor, with the Chapter, shall avoid it. So in the principal case, although it be provided by the statute of 11 H. 7. that the discontinuance, alienation, warranty, and recovery shall be void; yet they are not void presently, but are to be made void by such persons to whom, after the death of the woman, the interest, title, or inheritance appertains. And with this resolution agrees 27 H. 8. 23. b. on this very statute of 11 H. 7.

2. It was answered and resolved, that this case was out of the (c) intention of the said act for several reasons.

First, Because the intent of the act was to restrain women from making a discontinuance, warranty, and recovery, in bar, or prejudice of the heir in tail, or of them in remainder, &c. But when the heir in tail, in the case at bar, doth convey and assure the land to others, and the release or confirmation of the woman with warranty, is but to perfect and corroborate the estate which the heir in tail hath made, such warranty is not restrained by this act; for it shall be intended for the benefit of the heir, and not to his prejudice: and this was the reason that a common recovery, in respect of the intended recompence, was not restrained by the statute of West. 2. And therefore when the issue in tail, in the case at bar, hath suffered a common recovery, and the warranty of the woman extends only to strengthen it, this warranty is not restrained by the said act of (d) 11 H. 7.

H 4

The

(a) Co. Lit. 45. a.
Cr. El. 473.
474, 564. 5 Co.
5. 10 Co. 59. 2.
3 Keb. 109.
1 Mod. Rep. 205.
Cart. 13. 16.
1 Ventr. 247.
1 Rolle's Rep.
152. 154. 159.
169.

Hard. 156.

(b) Treby Argument in Quo
Warranto 4.
Co. Lit. 9. b.
94. b. 1 Rolle's
833. 2 Bulstr.
233. 21 Ed. 4.
13 a. 11 H. 7.
cap. 20.
Lucas 124.

(c) Cr. Jac. 475.

(d) 11 H. 7. 20.
Cro. Jac. 474.
475.

LINCOLN COLLEGE'S Case. Part III.

The second reason was, that the wife, with the heir in tail, might have joined in a fine, and so barred the estate-tail; or if the wife had (a) surrendered to the heir in tail, he might have suffered a recovery, and by that the estate-tail would be docked, and so they both had power to bar the estate-tail, and the remainder or reversion expectant thereupon: then it was not the intention of the act to restrain the warranty the wife made to him who had the land by conveyance of the heir in tail. And on the same reason it was adjudged M. 38 & 39 Eliz. in the King's Bench, between Jennings and Wiseman; and Hill. 39. in the Common Pleas, but the plea began Trin. 38 Eliz. Rot. 2302. between (b) Wiseman and Crow, and the case in both courts was the same, *scil.* Thomas Wiseman had issue William, his elder son by one *venter*, and Thomas and a daughter by another *venter*, and seised of land in Essex held in socage, devised to Dorothy his wife for life, the remainder to T. in tail, and died; whereby the wife was tenant for life, the remaind. to T. in tail, and the revers. of the fee descended to William; Dorothy, after the statute of 14 Eliz. suffered a common recovery, in which Thomas was vouched, who vouched over the common vouchee, which recovery was to the use of Thomas and his heirs; the daughter married Jennings, Thomas died without issue: now between Jennings and Crow his fermor, and Wiseman, son and heir of William, was the question for the said land: Wiseman objected, that the said common recovery was void by the express letter of the statute of 14 (c) Eliz. cap. 8. "Where divers persons being seised, &c. of any lands, &c. only for life or lives, or of estates determinable upon life or lives, have suffered other persons by agreement or covin to recover the same lands against the same particular tenants, &c. or as vouchees, to the great prejudice of those to whom the reversion or remainder hath appertained, or ought to appertain: be it enacted, that every such recovery, as of such person in reversion or remainder thereof, &c. be clearly and utterly void and of none effect: provided that every such recovery had by the assent of any person in reversion or remainder, so the same assent appear of record in any court, &c. shall stand in force against such person so assenting." And the said recovery was had against Dorothy, being tenant for life; and the said William Wiseman, who had the reversion in fee, never assented to the said recovery according to the said proviso: and therefore the said recovery should not bind him by the express letter of the act: but it was adjudged in both courts, that the reversion in fee was barred by the said recovery. And the said act of 14 (d) Eliz. did not extend to it: and the principal reason was, because it was

(a) Co. Lit.
362. a.
Postea 61. a.
3 Co. 88. a.

(b) 10 Co. 39. b.
43. b. Co. Lit.
362. a. Cr. El.
562, 570.
Co. Ent. 667.
nu. 16.
Moor 690.
1 And. 275.
Winch 43.
3 And. 276.

(c) Co. Lit.
356 a. b.
1 Co. 15. a.
10 Co. 37. a.
43. b. Cr. El.
562, 570.
Co. Ent. 655.
Moor 690.
1 And. 275.
Winch 43.
Co. Lit. 262. a.
362. a.
2 Leon. 62.

(d) Co. Lit.
356. a. 362. a.
1 Co. 15. a. b.

was not the intent of the act to extend to such recovery in which he in remainder in tail was vouched, because tenant in tail hath an estate of inheritance which may continue (a) for ever; and he hath power by a common recovery to dock all remainders and reversions expectant on his estate; and if Dorothy had (b) surrendered to him, then without question the recovery shall bar the reversion in fee: so Dorothy and Thomas had power to bar the reversion in fee, and neither the stat. of West. 2. cap. 3. (c) which gives receipt, extends to him in reversion or remainder expectant on an estate-tail, 33 H. 6. 22. 41 E. 3. 12. nor the stat. of (d) 9 R. 2. cap. 3. which gives the writ of error to him in reversion; nor doth the stat. of (e) 32 H. 8. cap. 31. made against common recoveries had against tenants for life, extend to remainders or reversions expectant on an estate-tail. So in the case at bar, forasmuch as he who had the estate-tail hath suffered a common recovery, and the wife hath released to the recoverors with warranty, the act of 11 H. 7. cap. 20. doth not extend to it, because the heir in tail hath power of himself to bar the tail, and the warranty of the wife is but to perfect his conveyance.

Thirdly, it was resolved, that in the case at bar when the said Edward, by the common recovery had against him by his own agreement, had disabled himself to take benefit of the forfeiture given by the statute, after the death of Edward, his issue should not take benefit thereof, because his father was in being at the time of the forfeiture, and could not enter; and a person who is not *in rerum natura*, or who hath not the immediate interest, title, or inheritance, at the time of the forfeiture, shall never take benefit of this act, when another was in being at the time of the forfeiture, and could not enter, and yet had power to bar by fine or recovery him who would claim the benefit of the act; and this was in effect adjudged in (f) Sir Geo. Brown's Case, where the issue in tail, in the life of his mother, having the reversion in fee, levied a fine without proclamations. And if error was in the said recovery, the warranty of the wife would bar Edward of his writ of error, because by his own act he hath barred himself from the remedy of entry, which the act prescribes. And the case of Doctor and (g) Student was affirmed to be good law; for there presently, by the recovery, the issue had title of entry on the recoveror; and therefore by his release by deed he could not bar his issue; but in the case at bar, the issue in tail first suffered the recovery, and so disabled himself before the warranty made; as also it was done in Sir Geo. Brown's case, by the fine levied in the life of the mother; and therefore in those cases title of entry was never given to the issue in tail, as it was in the case of Doctor

(a) 3 Co. 4. b.

(b) 1 Co. 63. a.

6 Co. 42. a.

10 Co. 37. b.

39. a. 46. a.

Cr. El. 718.

1 Rolle's 418.

2 Rolle's 396.

2 Brownl. 67.

(c) Co. Lit.

362. a. Ant.

4. a. 60. b.

(d) Plowd. 57. b.

10 Co. 44. b.

Reg. 122. a.

Ver. N. B. 112.

a. b. F. N. B.

108. a. 3 Co. 4.

a. b. 2 Bulst. 15.

Palm. 251, 253.

Dyer 1. pl. 5.

90. pl. 5.

Cr. El. 289.

4 Inst. 51. 9 R.

2. cap. 3.

(e) 10 Co. 44. b.

Cr. El. 562.

Co. Lit. 362. a.

1 And. 38.

2 Leon. 61, 62.

4 Leon. 126.

127, 128, 129.

Rastal Recov. 3.

(f) Antea 50. b.

Cr. El. 513.

Moor 455.

2 And. 44.

1 Rol. 878.

Jenk. Cent. 275.

(g) Antea 59. a.

Doct. Stud. lib. 1.

cap. 31.

and

and Student; and so a manifest diversity: but if Sibil had released after the death of Edward, then the issue of Edw. might have avoided the warranty by force of this act.

Note, reader, I conceive, that if a man makes a feoffment in fee, to the use of him and his wife in tail, and to the use of the husband in fee, and hath issue a daughter, and dies, his wife with child with a son, whereby the reversion in fee descends to the daughter; the wife, before the birth of the son, levies a fine, or suffers a common recovery; in this case, although the daughter doth or doth not enter, or although the (a) daughter had joined in the fine, or was vouched in the recovery, or by any other act had disabled herself from taking benefit of this act, yet the son, after born, should take benefit of this act; and that well agrees with this resolution. For by no act that the daughter could do, could she bar the son of the estate-tail, as Edward might in the case at bar; and therefore it stands with reason and equity, that no act which she could do should be prejudicial to the son, who was *in utero matris*. And this case is not to be compared to the case in (b) 5 E. 4. 6. a. For by the stat. of (c) 6 R. 2. cap. 6. it is provided, *quod proximus de sanguine eorundem rapientium & raptorum, cui hæreditas descendere, remanere, vel accidere deberet post mortem rapientis vel rapti, habeat titulum immediatè statim scilicet, post raptum intrandi super rapientem vel raptum, &c. & tenere de statu hæreditario*; in that case, if the daughter enters, she shall keep it for ever against the son after born: but although the daughter enters by force of the statute of 11 H. 7. yet the son born after shall enter upon her; and the cause and reason of this difference is, that the daughter, by the statute of 6 R. 2. hath the land merely as a perquisite in fee-simple: and by the exprefs words of the act, she shall enter and keep the land, for the stat. saith, *intrabit, &c. & tenebit de jure hæreditario*. And it is like the case of 9 (d) H. 7. 25. b. if a remainder be limited to the right heirs of J. S. and he dies, having a daughter, the (e) daughter shall have it as a purchaser, and shall keep the land against the son born after. But when the daughter enters by force of the act of 11 H. 7. she is *in* of an estate-tail *per formam doni*, and so in nature of a descent, and not merely as a purchaser; and that by the exprefs words of the stat. of 11 H. 7. which are, that the person to whom the lands appertain, after the decease of such woman, shall enter into the tenements, and possess and enjoy them according to such title and interest as they shall have, if such woman had been dead, and no discontinuance, warranty, or recovery had; so that the daughter in this case doth not claim the land merely as a perquisite, as she doth upon the statute of 6 R. 2. but by force of this act

(a) Hob. 333.

(b) 1 Co. 95. a.
3 Co. 39. b.
Fitz. Affize 27.
Plowd. 43. a.
51. b. 56. a. b.
Br. Done 28. 1
Co. 98. b. 137. b.
(c) 1 Co. 95. a.
Br. Entry con-
geable 94.
Plow. 42. b.
45. b. 2 Inst.
434. Long. 5^o.
Ed. 4. 58. a.
1 H. 6. 1. a. Br.
Rape 4. Br. Ap-
peal 48. Br.
Parliament 89.
Stam. Corone.
82. Hob. 74.
(d) 1 Co. 95. a.
99. a. Moor
340. 8 Co. 76. a.
Hob. 3. Cr.
Car. 87.
(e) 1 Co. 137. b.

act of 11 H. 7. she claims according to her title, as if the woman had been dead, and no act done against the stat. and that is *per formam doni*, and *per formam doni* the son after born is to be preferred before the daughter: and therefore this case is to be compared to (a) Shelley's case; in which case, although the use vested first in Richard the younger son, yet the son of the elder son, after born, shall enter on him, because Richard in that case was *in* in the nature of a descent, and not merely as a purchaser. And if the makers of the act of 11 H. 7. had been asked if in such case the wife might prejudice the son, wherewith she is big, of the benefit which they by the said act had provided, they would have answered, *absit quod licitum fuerit matri nocere filio qui in utero suo est*. And with this Montague Chief Justice of the Common Pleas, Plow. Com. 56. well agrees. And the opinion of the Court of Wards, 20 Eliz Dy. 362. a. (b) is not repugnant to it; for there the opinion is, that if the issue in tail, within age, enters by force of this act on a fine levied by his mother, and her second husband, he shall not be in ward, which may well be, for in such case he hath the land but during the coverture, and therefore is in manner a purchaser; also, although he should have the land in nature of a descent, yet it doth not follow that he shall be in ward; for in the case of wardship, there ought to be death, either natural or civil; it is necessary also, that the ancestor die in the lord's homage: and by this difference you will better understand your books in 9 H. 6. 25. 9 H. 7. 25. & Doctor and Student.

4. It was resolved *per totam curiam*, that if tenant in tail being *in* of another estate suffers a common recovery, and a collateral ancestor of the tenant in tail releases with warranty to the recoveror, and afterwards the recoveror makes a feoffment to uses, which are executed by the statute of 27 H. 8. and afterwards the collateral ancestor dies, in that case although the estate of the land be transferred in the Post. before the descent of the warranty, yet the warranty should bind, and the terre-tenants might take advantage thereof by way of rebutter: so if he to whom the warranty is made suffers a common recovery, and afterwards the ancestor dies, the recoveror might rebut by this warranty; and yet it is adjudged in (d) 22 Aff. 37. that if tenant in dower doth enfeoff a villain with warranty, and the lord of the villain enters into the land before the descent of the warranty, and afterwards the wife dies, this warranty should not bind the right heir: so it is agreed by the Justices in (e) 29 Aff. 34. If a collateral warranty be made to a bastard and his heirs, and living the ancestor, the bastard dies without issue, and the lord by escheat enters, and afterw. the ancestor

dies,

(a) 1 Co. 106. b.
155 b. Mo. 140,
141, 482. 1 Jones
59. Jenk. Cent.
249. 1 Co. 94. b.
2 Leon. 27.

(b) Dyer 362.
pl. 16. Co. Lit.
326, b. 365. b.

(c) Cr. Car. 370.
2 Rol. 776, 777.
Co. Lit. 385. a.
1 Jones 200.

(d) Dr. & Stud.
129. b. 10 Co.
48 a. Br. Choise
in Action 8. Br.
Garranty 45.
Cr. Car. 370.
1 Co. 136. a. Br.
Villinage 37.
Hob. 27. Vaugh.
391, 392, 393.
18 E. 3. 29. b.
Co. Lit. 117. a.
2 Rol. 733. Br.
Voucher 132.
(e) Cr. Car. 370.
Vaugh. 392.
1 Co. 136. a.
Hub. 27.

Co. Lit. 385. a.

(a) Co. Lit.
315. b. 1 Mod.
Rep. 192. Mo.
98. 4 Co. 50. b.
(b) Co. Lit.
215. b.

(c) 2 Rol. 776.
Cr. Car. 370.

(d) Vaugh. 386.

(e) Vaugh. 386,
387.

(f) Vaugh. 386.

dies, this warranty shall not bind. And although as well in the case at bar, as in those two cases, before the warranty descends, the estate of the land is transferred in the Post, yet there is a great difference between those two cases, and the case at bar; for he who hath the land by the limitation of an use, or by a common recovery, comes to the land by the limitation and act of the party; and therefore he who hath a reversion by (a) the limitation of an use, or by common recovery, although he be in the Post in both cases; yet he shall take benefit of a condition as an assignee within the statute of 32 H. 8. cap. 34. But when the (b) lord of a villein enters, he comes to the land in respect of a title paramount, that is to say, in respect of villeinage, and the lord by escheat in respect of the feigniory which was a title paramount, and both those are *in* merely in the (c) Post, and not by any limitation or act of the party, and so a manifest difference. And although some presume to say that those books are erroneous, and against law, and their reasons are, *scil.* because it was held in the time of E. 3. *scil.* in (d) 8 E. 3. 10. a. that the tenant shall not take advantage of a warranty by way of rebutter, without shewing how the warranty extends to him; which is as much as to say, to make him assignee to the land; so that one who comes *in* in the Post, shall not rebut. And in (e) 10 E. 3. 42. 10 Aff. 5. in an assize the tenant pleaded a warranty made to one W. &c. and concluded on the warranty as assignee to W. and demanded judgment, &c. and was charged by the party, and by the court, to say how he was assignee, and so he did: and in (f) 22 Aff. 88. in the same year, when one of the said cases was adjudged, it was held that one should not take advantage of a warranty made to another and his assigns by way of rebutter, although he be an assignee without deed, and that in case of rebutter, as well as in case of voucher he ought to shew as well the deed which comprehends the warranty, as the deed which proves the assignment: and these errors were the cause, as they said, that it was then held, that neither the lord of the villein, nor the lord by escheat should take advantage of a warranty by way of rebutter: but I conceive, the true reason of the said books is utterly mistaken. For true it is, that some judges in those times thought, that none should take advantage by rebutter of a warranty made to one, his heirs and assigns, but he who was heir or assignee: and that the terretenant ought in case of voucher and rebutter, to shew deeds of the mean assignments; which opinion hath great semblance of reason, because the warranty extends only to the feoffee, his heirs and assigns. And a thing, which of its own nature cannot be created without deed, cannot be assigned without deed:

deed: but I well agree that such opinions were against the true sense and judgment of the law in both points: for (a) he, who hath the possession of the land, shall rebut the demandant himself, without shewing how he came to the possession of it; for it is sufficient for him to defend his possession, and to bar the demandant; and the demandant against the warranty cannot recover the land: and so was it held 35 Aff. 9. that tenant by the curtesy might rebut. And in (b) 45 E. 3. 18. it is adjudged, that the donee in tail, although he be *in* of another estate, might rebut the demandant. And in (c) 38 E. 3. 26. it is adjudged, that the assignee might rebut by force of a warranty, made to one and his heirs: and (d) 7 E. 3. 34. & 46 E. 3. 4. Feoffee of the donee in tail might (e) rebut: I likewise well agree, that if A. enfeoffs B. his heirs and assigns with warranty, and B. enfeoffs C. without deed, C. shall (f) vouch A. as assignee, for the warranty extends to B. and his assigns of the land, and C. is his assignee thereof, and the assignment is not made of the Warranty, for then it ought to be by deed, but the warranty cannot be assigned, but extends to the assignees of the land; and if the feoffment to C. was by deed, it is only of the land, and not of the warranty; and C. shall vouch A. as assignee of the land, because the war. by express words extends to him, that is to say, to B. and his assignees of the land; and if the feoffee without deed shall not vouch as assignee, truly the feoffee by deed shall not vouch, for one of them is as well assignee of the land as the other, and none of them hath or can have assignment of the warranty.

And so it was resolved, *Pasch.* 36 Eliz. in the K.'s B. between (g) Auder and Noke, on a writ of error on a judgment given in a writ of covenant in C. B. by Popham C. J. Gawdy, and the whole court, on conference had with divers other Justices; that if a man makes a lease for years, and covenants with him and his (h) assigns, his assignee by parol shall have an action of covenant: so feoffee by parol shall (i) vouch as assignee; and therefore the books which speak of shewing the deed comprehending the warranty, and of the deed of assignment, are to be intended of things which lie in (k) grant, which cannot be assigned without (l) deed. And so may all the books be well reconciled. 8 Aff. 33. 9 Aff. 11. 10 Aff. 5. 10 E. 3. 42. 11 E. 3. Br. *Monstrans de faits* 164. 13 E. 3. Voucher 17. 14 E. 3. Garr. 33. 12 E. 3. Condition 11. 17 E. 3. 68. 22 Aff. 88. 40 E. 3. 22, 23. 40 Aff. 30. 42 E. 3. 19. 3 H. 7. 13 & 14 b. 3 H. 6. 21. Statham Assignee 1.

But note reader, that these were not the reasons of the said books in 22 Aff. 37. and 29 Aff. 34. which have been alledged, for it appears by both the books, that if the warranty had bound, and had been a bar in right in the one case, *viz.* of the villein, *hoc est*, if

(a) Vaugh. 384, 385. Cr. Car. 371. 3. Ed. 3. 34. pl. 5.

(b) Co. Lit. 385. Vaugh. 387, 389, 398.

(c) 38 E. 3. 21. Vaugh. 384, 388. Co. Lit. 385. a.

(d) Vaugh. 388, 389.

(e) Co. Lit. 385. a. 10 Co. 76. a. 1 Bull. 166. Br. Formedon 57. Plowd. 436. b. Fitz. Garranty 18. Statham Garranty 4.

(f) Co. Lit. 385. b. 1. Co. 1. b.

(g) Cr. El. 373. 436. Mo. 419.

(h) 4 Co. 80. b. 5 Co. 17, 18. (i) 2 Rol. 754.

(k) Co. Lit. 172. a. 9. b. (l) Cr. El. 373.

Co. Lit. 340. b.
sect. 642. Co.
Lit. 144. a.

if the warranty had descended before the lord of the villein had entered; and in the other case, if the ancestor had died before the tenant (so that the warranty had descended before the escheat) the lord by escheat in the one case, and the lord of the villein in the other case, should take advantage of the war. by way of rebutter; and that appears by the rule of both books. And therefore those, who condemned the said books, were not well apprised of the true reason of them. And I dare not take upon me, or presume to oppose the authority of the said books. For Master Littleton seems to agree with the reason of them in his chapter of Discontinuance sect. 642. for he saith, *Nota*, if there be lord and tenant, and the tenant gives the tenements to another in tail, the remainder to another in fee; and afterwards the donee makes a lease for life, and grants the reversion to another in fee, and the tenant for life attorns, and afterwards the grantee dies without heir, whereby the reversion escheats to the lord; in this case, if the tenant for term of life dies, and the lord by escheat enters in the life of the tenant in tail, it is no discontinuance, because the lord is *in* by way of escheat, and not by the tenant in tail (and therefore the entry of the issue in tail, in such case was lawful, because the lord by escheat cannot take advantage of any warranty which tenant in tail, as was intended, had made) But Littleton saith, *secus esset*, if the reversion had been executed in the grantee, in the life of tenant in tail, for he was *in* by the tenant in tail.

PENNANT's Case.

3 Salk. 3.

Trin. 38 Eliz. In the Queen's Bench,
between Thomas Harvy and Walter
Oswald.

IN an *ejectione firmæ*, between Harvy plaintiff, and Oswald defendant, on a demise made 37 Eliz. by John Pennant to the plaintiff, of certain land in Ardeley in the county of Essex, for three years, from the feast of All Saints, *ann.* 37. The defendant pleaded, that the said John Pennant was seised of the said land in fee, and *anno* 35. demised it to the defendant for 10 years, yielding the yearly rent of 33l. 10s. at the feast of St. Michael, and the Annunciation of our Lady; and that he was possessed till Pennant ousted him, and demised to the plaintiff, and he re-entered, &c. The plaintiff replied, and confessed the said lease, but further said, that the said lease was on condition, that if the defendant, his executors or administrators, at any time without the assent of the said John Pennant, his heirs or assigns, did grant, alien, or assign the said land, or any part thereof, that then it should be lawful for the said Pennant and his heirs to re-enter: and that the defendant, *anno* 35. granted to one Taylor parcel of the said land for six years, without the assent of Pennant, for which he re-entered, and made the lease to the plaintiff, *prout, &c.*

Moor 426, 456.
Cro. Eliz. 553,
572. 2 Anderl.
90.

The defendant by way of rejoinder, said, that before the re-entry Pennant accepted the rent due at the feast of the Annunciation of our Lady, after the assignment by the hands of the defend. Walter Oswald. To which the plaintiff by way of sur-rejoinder said, that Pennant before the receipt of the rent had no notice of the said demise to Taylor, on which plea the defendant did demur in law: and Trin. 39 Eliz. it was adjudged for the plaintiff. And in this case these points were resolved:

3 Salk. 3, 4.
Skin. 31.

1. That the condition being (a) collateral, the breach of it might be so secretly contrived, as to be impossible for the lessor

(a) Cro. El. 528.
553, 572. Moor
426, 456. 8 Co.
92. a.

(a) Palm. 433.
8 Co. 92 a. Cr.
El. 572. Har-
dies 48.
(b) Doct. pla.
189.

(c) Cr. El. 3.
528, 529, 553.
Moor 426. 1 Le-
on. 262. Godb.
47. Co. Lit. 211.
a. b.
(d) Cr. El. 572.
Cr. Car. 512.
Co. Lit. 211. b.

(e) 1 Leon. 262.
Cr. El. 3.

F. N. B. 120. b.
H. 3 Co. 23. b.
4 Co. 49.

(f) Moor 426.

(g) 1 Rolle's 475.
14 E. 3. Entre
congeable 41.
Co. Lit. 211. b.
Cr. El. 3.
Plowd. 113. b.
136. b.

(h) Cr. Car. 512.
Cr. El. 167, 221.
1 Rolle's 475.
1 And. 304, 305,
306. Godb. 47.
Co. Lit. 215. a.

(i) 32 H. 8. Br.
Acceptance 13.
(k) 8 Co. 95. b.
Co. Lit. 214. b.
Plowd. 135. b.
Dyer 239. pl. 42.

lessor to come to the knowledge of it, and therefore (a) notice in this case is material and (b) issuable, for otherwise the lessee would take advantage of his own fraud, for he might make the grant or demise so secretly, and so near the day on which the rent is to be paid, as to be impossible for the lessor to have notice of it: but if a man makes a lease for years rendering rent, on condition that if the (c) rent be behind, that it shall be lawful for him to re-enter; in that case, if the lessor demands the rent, and it is not paid, and afterwards he accepts the rent (before the re-entry made) at a day after, he hath (d) dispensed with the condition, for there the condition being annexed to the rent, and he having made a demand for the rent, he well knew that the condition was broke: but although in such a case, he (e) accepts the rent (due at the day for which the demand was made) yet he may re-enter, for as well before as after his re-entry, he may have an action of debt for the rent, on the contract between the lessor and lessee, and that was the first difference between a collateral condition and a condition annexed to rent. *Vide (f)* 45 Aff. 5.

The second difference was, that in case of a condition annexed to rent, if the lessor (g) distrains for the same rents for which the demand was made, he hath thereby also affirmed the lease, for his distress for the rent received; for after the lease determined he cannot distrain for the rent. 14 Aff. 11 Accord.

The third was, that as well in case of a condition annexed to rent, as in case of a condition annexed to any collateral act, if the conclusion of the condition be, that then the lease for years shall be void, there no acceptance of rent (due at any day after the breach of the condition) will make the void lease good. And so a difference between a lease which is (*ipso facto*) void without any re-entry, and a lease which is voidable by re-entry; for a lease which is *ipso facto* void by the breach of the condition, cannot be made good by any acceptance afterwards. Plow. Com. in Browning and Beston's case 133.

The fourth was, as the affirmation of a voidable lease by parol for money (or other consideration) will not avail the lessee; so the acceptance of a rent (which is not in *esse*, nor due to him who accepts it) will not bind him: as if land be given to husband and wife, and to the heirs of the body of the husband, the husband makes a lease for 40 years and dies, the issue in tail accepts the rent in the life of the wife, and afterwards the wife dies; yet the issue shall avoid the lease; for at the time of the accept. no rent was in *esse*, or due to him. *Vide* 32 H. 8. Br. (i) Acceptance.

The fifth was (k) between a lease for life and a lease for years, for in the case of a lease for life, if the conclusion of a condition annexed to the rent (or other col. act) be, that then the

the lease shall be void, there (because an estate of freehold be- created by livery, cannot be determined before (a) entry) in such case acceptance of rent due at a day after, shall bar the lessor of his re-entry, for this voidable lease may well be af- firmed by acceptance of rent: and therefore, if a man makes a lease for years, on condition that if the lessee do not go to Rome, or any other collateral condition, with conclusion that the lease shall be void, in that case, if the lessor grants over the reversion, and afterwards the condition is broke, the grantee (b) shall take benefit thereof; for the lease is void, and not voidable by re-entry; and therefore the grantee who is a stranger, may take benefit thereof; but if the lease be made for life (c) with such condition, there the grantee shall never take benefit of it, for the estate for life doth not determine be- fore entry, and entry or re-entry in no case (by the common law) can be given to a stranger, 11 H. 7. 17. a. Br. Cond. 245. 10 E. 3. 52. *per* Stone, 21 H. 7. 12. a. So if a (d) Par- son, Vicar, or Prebend, makes a lease for years, rendering rent, and dies, the successor accepts the rent, it is nothing worth, for the lease was void by his death, (e) otherwise is it of a lease for life: but if a (f) Bishop, Abbot, Prior, or such like, makes a lease for years and dies, if the successor accepts the rent, he shall never avoid the lease, for the lease was only voidable, 11 E. 3. Abbot 9. 8 H. 5. 19. 37 H. 6. b. 24 H. 8. Br. Leases 19 F. N. B. 50. C.

But note, reader, I conceive, that in the case of a lease for life, if the lessor accepts the same rent which was demanded, he hath affirmed the lease, for he cannot receive it as due on any contract, as in the case of a lease for years, but he ought to receive it as his rent, and then he doth affirm the lease to continue; for when he accepted the rent, he could not have an action of debt for it, but his remedy then was by assise, if he had seisin, or by distress. And therefore I conceive in such case, the acceptance of the rent shall bar him of his re-entry: and it appears by Littleton, cap Conditions, fol. 79 a. That in such case, if the lessor brings an (g) assise for the rent, he relinquishes, and waves the benefit of his re-entry, although it be for the rent due at the same day; but if he (h) re enters first, then he may have an action of debt for the rent behind, 17 E. 3. 73. 18 E. 3. 10. 30 E. 3. 7. 38 E. 3. 10. And after- wards, Mich. 39 & 40 Eliz. in the Common Pleas, which plea began Hil. 38 Eliz. Rot. 1302. in trespass between (i) March and Curtis, for land in Essex, the like judgment was given by Anderson, (Chief Justice there) Walmesley Justice, and the whole court, where a lease for years was made, rendering rent, and with condition that if the lessee should assign his term, that the lessor might re-enter, and

- (a) 1 Roll. 408.
Br. N. C. 265.
Moor 292.
21 H. 7. 12. 2.
Mo. 345, 346.
Plow. 413. a.
135. b. 142. b.
Br. Condition
245. 2 Co 53. b.
3 Co. 59. b.
Co. Lit. 218. a.
(b) Co. Lit. 215.
a. Cr. El. 649,
650. 1 Leon. 61.
1 Rolle's 473. n. 6.
8 Co. 95. b.
10 Co. 48. b.
Co. Lit. 214. b.
Lit. sect. 347.
(c) 8 Co. 95. b. 96.
10 Co. 48. b. Co.
Lit. 215. a. Perk.
sect. 831. F. N. B.
201. C. Dyer
127. pl. 56. Lit.
sect. 347.
Plowd. 34. a.
(d) Cro. El. 18.
1 Rolle's 831. Co.
Lit. 45. b. Dyer
239. b. pl. 51. 42.
8 H. 5. 10. b.
B. N. C. 381.
(e) Co. Lit. 45. b.
1 Rolle's 821.
(f) Co. Lit. 44. b.
B. N. C. 380.
2 E. 6. Br. Ac-
ceptance 20.
Cr. Jac. 173.
Dyer 46. pl. 9.
Cro. Car. 96.
1 Rolle's 476.
2 Roll. Rep. 161.
(g) Co. Lit. 211.
b. Co. Lit. sect.
341.
(h) F. N. B. 120.
H. 3 Co. 23. b.
Kelw. 112. b.
Br. Arrearages,
11.
(i) Moor 425.
Co. Ent. 215. n.
13. 1 Brownl.
78. Noy. 7.
Anderf. 42, 90.
Cro. El. 528.
1 Rolle's 427.

(a) Moor 426.

the lessee assigned his term, that although the lessor had accepted the rent by the hands of the lessee, yet forasmuch as the lessor had not notice of the assignment, the acceptance of the rent did not (a) conclude him of his entry: so this point hath been adjudged by both courts. See for the said differences (which lie obscurely in our books) 45 Aff. 5. the case of waste, 22 H. 6. 57. 6 H. 7. 3. b. F. N. B. 120, 122. Plow. Com. Browning and Beston's case 133, 545. 14 Aff. 11. 40 E. 3. Entry Congeable 41. 11 H. 7. 17. 10 E. 3. 52. 21 H. 7. 12. 21 H. 6. 24. 39 H. 6. 27. 26 H. 8.

(b) 1 Syd. 44.
Co. Lit. 373. a.
1 Keb. 95. pl. 84.
113. pl. 15.
Raym. 21. 11 H.
4. 55. Moor 426.
87, 88. 1 An-
derf. 14. pl. 30.
2 Ander 91.
178. N. Bendl.
188. pl. 228. Co.
Ent. 589. pl. 8.
39 H. 6. Bar. 79.
1 H. 5. 7. b.
Dy. 271. pl. 26.

And in these two cases many good cases and diff. were taken, when acceptance of rent (or other things) shall bar him who accepts it of the arrearages of the rent, of re-entry, of action, or of execution, and the reason of the old books briefly reported, and in an obscure manner, well explained. If he who hath a rent-service or a rent-charge, accept the rent due at the last day, and thereof makes an acquittance, all the (b) arrearages due before are thereby discharged: and so was it adjudged between Hopkins and Morton in the Com Pleas, Hil. Rot. 950. *vide* 10 Eliz. Dyer 271. but there the case is left at large; and therewith agrees 11 H. 4. 24. and 1 H. 5. 7. b. But note, it appears by the said record of 10 El. that the bar to the avowry ought to be in such case, with conclus. of judgment, if against this deed of acquittance he ought to make avowry; so that it appears that the acquittance is the cause of the bar of estoppel in such case. For it appears by 8 Aff. pl. ult. 9 E. 3. 9. 29 E. 3. 34. that if a man makes a lease for life rendering rent, or if there be lord and tenant by fealty and rent, and the rent is behind for two years; and afterwards the lessor or the lord disseises the terre-tenant, and afterwards the tenant recovers against him in assise, and the rent, which incurred during the disseisin, is recouped in damages, yet the lord or lessor shall recover in the assise, the arrearages before the disseisin; and the bar of the latter years, is no bar of the arrearages before. *Vide* 39 H. 6. Bar. 79. where the principal case of annuity may be good law, either because there the defendant pleaded the acquittance for the last day, and demanded judgment of action, where he ought to have relied upon the acquittance. Or because in the case of annuity he is not bound to pay the annuity without acquittance: but in the case of rent-service, or rent-charge, he who receives it is not compellable to make an acquittance, but the making thereof is his voluntary act, to which the law doth not compel him.

(c) Co. Lit. 269.
b.
6 Co. 58.

If there be (c) lord and ten. and the rent is behind, and the ten. makes a feoffm. in fee, if the lord accepts the rent or service of the feoffee, he shall lose the arrearages in the time of the feoffor, although

though he makes no acquittance; for after such acceptance he shall not avow on the feoffor at all, nor on the feoffee, but for the services which incurred in his time, as appears in 4 E. 3. 22. 7 E. 3. 8. 7 E. 4. 27. 29 H. 8. Br. Avowry 111. But in such case, if the feoffor dies, although the lord (a) accepts the rent or service by the hand of the feoffee, he shall not lose the arrearages, for now the lord cannot avow on other, but only on the feoffee: and that, to which the law compels a man, shall not prejudice him.

(a) 1 Rolle's 317.
Co. Lit. 269. b.

So, and for the same reason, if there be (b) lord, mesne and tenant, and the rent due by the mesne is behind, and afterwards the tenant doth forejudge the mesne, and the lord receives the services of the mesne, which now issue immediately out of the tenancy, yet he shall not be barred of the arrearages which issue out of the mesnalty: so, if the rent be behind, and the tenant dies, the acceptance of the services by the hands of the (c) heir shall not bar him of the arrearages; for in these cases, although the person be altered, yet the lord doth accept the rent and services of him who only ought to do them; and all this appears in 4 E. 3. 22. 7 E. 3. 4. 7 E. 4. 27. 29 H. 8. Avowry Br. 111. But acceptance of rent or services by the hands of the feoffee shall not bar the lord of the (d) relief before due, for relief is no (e) service, but a fruit and approvement of services; for if it were part of the services, then an action of (f) debt would not lie for it so long as the rent continues, but it is as a blossom of fruit fallen from the tree; and for relief, it is not necessary to avow on any person certain: and the book in 4 E. 3. 22. is to be intended, that the father made a feoffment in fee by (g) collusion and died: and there it is held, that if the lord had accepted the services by the hands of the feoffee in the life of the father, he should lose his relief.

(b) Co. Lit. 265. b.

(c) Co. Lit. 269. b.

(d) 2 And. 178.
Cro. Eliz. 885.
Moor 643.
(e) 2 Rolle's 514,
515. Co. Lit.
83. a.

(f) Dall. 17. pl. 6.
Co. Lit. 83. a. b.
1 Roll's 596,
665.

(g) Co. Lit. 84. a.

But note, reader, relief was not taken within the equity of the statute of Marlebridge, as it is adjudged in 17 [27] E. 3. 63. but now it is remedied by the stat. of 32 & 34 H. 8. of wills. But in the case before, the lord (before acceptance of the rent or service by the hands of the feoffee) might have (b) avowed on the feoffee for all the arrearages incurred, as well in the time of the feoffor, as in the time of the feoffee, as it is in 7 H. 4. 14. 19 E. 2. Avow. 222. And by what hath been said it appears, that the acceptance of homage or any other service of the heir, shall not bar the lord of relief, *vid. temp.* E. 1. Relief 13. 15 E. 3. ib. 5. 16 E. 3. ib. 10. 3 E. 2. Avow. 190.

(b) 21 H. 8.
cap. 19. Co.
Lit. 269. b.
Relief, what?
Britton cap. 69.
fo. 178. Bracton
lib. 2. cap. 36.

And it was further said, that if there be lord and tenant by knights service, and the tenant enfeoffs his son and heir apparent within age by collusion, if the lord accepts the services by the hands of the feoffee, he shall lose the (i) wardship: but against that it was objected,

(i) F.N.B. 142.
E. 1 Co. 122. a.
2 Co. 94. a.

1 Rolle's 317.

1. That the feoffee might compel the lord to avow on him, by giving notice and tendering the arrearages, and that which the law compels one to do, shall not prejudice or estop him.

2. That acceptance doth not conclude before title accrued, and no title of wardship in this case was accrued to the lord at the time of the acceptance, but it accrued after the death of the feoffor.

As to the first it was answered, that the feoffee by no tender that he could make, could compel the lord to avow on him; for the lord might shew, that the feoffment was by collusion, against the statute of Marlebridge, cap. 6. and therefore he might maintain his avowry on the feoffor; for the law will not compel him to avow on the feoffee to his prejudice.

As to the second, it was answered, that the statute of Marlebridge hath made such feoffment, made by collusion, as void and of no effect as to the lord: and therefore. if the lord will affirm the feoffment, and wave the benefit of the act, by accepting the feoffee for his tenant, he shall purge the collusion, and lose the wardship. And the reason of Prisot, 33 H. 6. 16. that such acceptance should not conclude the lord was, because the feoffee in such case might compel the lord to avow on him, but that is not law, and against the opinion of Prisot, see 31 E. 3. Garde 154. 33 E. 3. Garde 33. F. N. B. 142. And now the doubt in 36 E. 3. Garde 11. is well explained.

[See 2. Black. Com. ch. 10. of Estates upon Condition.]

W E S T B Y's Case.

Hil. Term, 34 Eliz. in B. R. Rot. 169.

BE it remembered that heretofore, that is to say, in the term of St. Michael last past, before the lady the Queen at Westminster came Titus Westby, by Tho. Cook his attorney, and brought here into the court of the said lady the Q. then there, his certain bill against Tho. Skinner and John Catcher, late Sheriffs of London, in custody of the Marshal, &c. of a plea of debt, and there are pledges of prosecuting (to wit) John Doe and Rich. Roe, which said bill follows in these words; ff. London, ff. Titus Westby complains of Thomas Skinner and John Catcher, late Sheriffs of London, being in custody of the Marshal of the Marshalsea of the lady the Q. before the Q. herself, of a plea, that they render to him 440 l. of lawful money of England, which they owe to him and unjustly detain. For that, to wit, that whereas Tho. Smith, Gent. Edw. Winter, Gent. and Anthony Bustard, Gent. by the names of Tho. Smith of Camden in the county of Gloucester, Gent. Edw. Winter of Worthington in the county of Leicester, Gent. and Anthony Bustard of Alderbury in the county of Oxford, Gent. on the 20th day of January in the 29th year of the reign of the lady the now Queen at Westm. in the county of Middlesex, before Sir Christ. Wray, Knt. then Chief Justice of the said lady the Q. assigned to hold pleas, before the said Q. herself, by their certain writing obligatory, sealed with their seals, had granted themselves to be bounden, and did acknowledge themselves to owe to the afore-said Titus, by the name of Titus Westby, citizen and merchant taylor of London, in the sum of 440 pounds, to be paid to the said Titus, or to his certain attorney, (on shewing the said writing) his heirs, or executors, in the Feast of the Annunciat. of the blessed Mary the Virgin

London ff.
Declaration in
debt on an
escape.

then next following; and if they should make default in the payment of the debt afores. then the said Tho. Smith, Edw. Winter, and Anthony Bustard, willed and granted, that then there should run upon the said Tho. Edw. and Anthony, and every of them, their heirs and executors, the penalty in the statute staple of debts for merchandises in the same bought to be recovered, ordained, and provided; and whereas also the said Tho. Edw. and Anthony, the said 440 l. by them, in the form afores. acknowledged in the feast afores. to the aforesaid Titus had not paid, nor any of them had paid; by which afterwards, that is to say, on the 11th day of April in the 30th year of the reign of the said lady the now Queen, one John Cholmley, Esq. then Clerk of the said lady the now Queen, of the recognizances for debts to be recovered according to the form of the stat. in the like case provided, deputed, by his writing, sealed with his seal, did certify the recognizance aforesaid in the Chancery of the said lady the now Q. at Westminster afores. then being, at the request of the said Titus; and the said Titus thereupon afterwards, that is to say, on the 31st day of August in the 30th year of the reign of the said lady the now Q. afores. sued forth out of the said Court of Chancery at Westm. afores. then being, a certain writ of the said lady the Q. to the then Sheriffs of London directed; by which writ reciting, because the afores. Tho. Smith, Edw. Winter, and Anthony Bustard, on the 20th day of Jan. in the 29th year of the reign of the said lady the now Q. before Christopher Wray, Knt. Chief Justice of the said lady the Q. assigned to hold pleas before the said Q. herself, did acknowledge themselves, to owe to the aforesaid Titus 440 l. which to the same Titus they ought to have paid in the Feast of the Annunciation of the blessed Mary the Virgin then next following, and the same day of issuing out of this writ had not paid, nor any of them then had paid, as was said; the said lady the Q. by the said writ commanded the then Sheriffs of London, that the bodies of the said Tho. Smith, Edw. Winter, and Anthony Bustard, if they were laymen, should be taken, and in the prison of the said lady the now Q. be safely kept, until the said Tho. Westby should be fully satisfied of the debt aforesaid; and all the lands and chattles of the said Thomas, Edward, and Anthony, in the bailiwick of the said Sheriffs, by the oath of honest and lawful men of their bailiwick, by whom the truth of the matter might be better known according to the true value thereof, they should diligently extend and apprise, and seize into the hands of the said lady the Queen, that the same to the aforesaid Titus, until to him of his debt aforesaid he should be fully satisfied, they should make delivery, according to the form of the statute at Westminster for the like debts to be recovered thereof made and provided; and how the Sheriffs aforesaid should execute the same precept, they should make known to the said lady the Queen in her Chancery, in 15 days of St. Martin then next coming, where-

wheresoever she should then be, by their letters sealed; and that they should have there the said writ; which said writ the said Titus Westby afterwards, and before the said 15th day of St. Martin, that is to say, on the eighth day of September, in the 30th year of the reign of the said lady the now Queen afore said at London, that is to say, in the parish of Christ-Church, in the ward of Farringdon within, delivered, to the said Thomas Skinner and John Catcher, then being Sheriffs of London, to be executed in form of law: and the said Titus further saith; that the said Anth. Bustard, at the same time of the delivery of the said writ to the said Tho. Skinner and John Catcher, as before is said, made, was a layman, and yet is a layman; and that by virtue of the said writ afterwards, and before the return thereof, that is to say, on the said eighth day of September in the 30th year of the reign of the said lady the now Queen afore said, the afore said Thomas Skinner and John Catcher then being Sheriffs of London, took and arrested the afore said Anthony Bustard at London, in the parish and ward afore said, by virtue of the writ afore said, and the said Anthony in execution for the afore said 440 l. then and there had according to the exigency of the said writ; and the said Anthony being under the custody of the said Tho. Skinner and John Catcher, Sheriffs, in execution in the form afore said, the said Tho. Skinner and John Catcher Sheriffs, him the said Anthony Bustard afterwards, that is to say, on the 20th day of October, in the 30th year afore said at London, in the parish and ward afore said, from the custody of the said Thomas Skinner and John Catcher Sheriffs, did suffer to go at large, where he would, the said Titus, of the afore said 440 l. not being satisfied; by which an action hath accrued to the said Titus, to demand and have of the said Thomas Skinner and John Catcher the afore said 440 l. for his debt afore said, by the said Anthony in form afore said acknowledged; yet the said Thomas Skinner and John Catcher, although often requested, &c. the afore said 440 l. to the said Titus have not yet rendered, but have hitherto denied to render the same unto him, and do yet deny so to do; whereupon the said Titus saith, that he is injured, and hath damage to the value of 40 l. and thereof he bringeth his suit, &c. And now at this day, that is to say, Monday next after eight days of St. Hilary in the self same term, until which day the said Thomas Skinner and John Catcher had licence to imparl to the said bill, and then to answer, &c. before the lady the Q. at Westm. come as well the said Titus Westby, by his attorney afore. as the said Tho. Skinner and John Catcher, by Christo. Rust their attorney; and the said Tho. Skinner and John Catcher defend the force and injury when, &c. and say, that they do not owe

Pleadings in WESTBY'S Case. Part III.

to the afores. Titus the afores. 440 l. or any penny thereof, in manner and form as the said Titus above against them hath declared; and of this they put themselves upon the country; and the said Titus likewise, &c. Therefore let a jury come before the lady the Queen at Westminster on Saturday next after 15 Days of Easter; and who neither, &c. to recognize, &c. because as well, &c. The same day is given to the parties afores. there, &c. Afterwards the proceeding thereof was continued between the parties afores. of the plea afores. by jurors between them being respited before the lady the Q. at Westm. until Monday next after three weeks of the Holy Trinity, then next following; unless the beloved and faithful of the said lady the Queen John Popham, Knt. Chief Justice of the said lady the Queen assigned to hold pleas, in the court of the said lady the Queen before the Queen herself, on Saturday next after 15 days of the Holy Trinity, at Guildhall London, by form of the stat. &c. should first come, for default of jurors, &c. At which Monday next after three weeks of the Holy Trinity, before the lady the Queen at Westm. come the parties aforesaid, by their attornies aforesaid; and the afores. Chief Justice before whom, &c. sent here his record before him had, in these words, that is to say, afterwards, at the day and place within contained, before John Popham, Knt. Chief Justice, within written, associating to him Tho. Povey, by the form of the statute, &c. came as well the within named Titus Westby, as the within written Tho. Skinner and John Catcher, by their attornies within contained; and the jurors sworn, whereof within mention is made, some of them came, and some of them did not come, as it appeareth in the panel; and some of the said jurors now appeared, that is to say, John Sly, Tho. Worship, Arthur Parkins, Will. Tegoe, and John Wiggenton came, and were sworn in the jury afores. and because the rest of the jurors of the said jury did not appear; therof. others of the standers by, chosen by the Sheriffs of London at the request of the said Titus Westby, and by the command of the Chief Justice aforesaid were newly put, whose names are filed to the panel within written, according to the form of the statute in that case made and provided; which jurors so newly put appeared, that is to say, John Patson, Geo. Clarke, Alex. Sharpe, Edw. Flory, Tho. Chapman, Emanuel Trumbel, and Henry Field came, who being sworn to say the truth of the matters within contained, with the other jurors, chosen, tried and sworn, say upon their oath, that the within written Thomas Smith, Edward Winter, and Anthony Bustard, on the within written 21st day of January in the 29th year within written, at Westm. in the county of Middlesex within written, before the within named Christopher Wray, Knt. then Ch. Justice of the lady the Queen assigned to hold pleas before the Queen herself, by their writing obligatory within specified,

sealed

sealed with their seals, granted themselves to be bounden, and acknowledged that they did owe to the afores. Titus the within written 440l. to be paid to the same Titus, or his certain attorn. (on shewing that writing) their heirs or executors, on the within written feast of the Annunciation of the blessed Mary the Virgin then next following; and if they should make default in payment of the said debt, that then the said Tho. Smith, Edw. Winter, and Anthony Bustard, willed and granted that then should run upon them the said Tho. Edw. and Anthony, and every of them, their heirs and executors, the penalty in the stat. of debts for merchandizes in the same bought to be recovered, ordained, and provided, in manner and form as the said Titus likewise within against them hath declared; and that the said statute which the said Tho. sueth, Edw. Winter, and Anthony Bustard in form afores. acknowledged, afterwards, that is to say, on the within written 11th day of April in the 30th year of the reign of the said lady the now Q. within written, by the within named John Chomley, Esq. then Clerk of the said lady the now Queen of recognizances of debts to be recovered, according to the form of the stat. in the like case provided, deputed, by his writing within written, sealed with his seal, into the Chancery of the said lady the Queen within written, it was certified in manner and form, as the said Titus within likewise against the said Thomas Skinner and John Catcher hath declared: and that thereupon the said Titus afterwards, that is to say, on the within written 31st day of August in the 30th year within written, sued forth out of the said Court of Chancery within written, the writ afores. within specified, of the said lady the now Q. to the Sheriffs of London directed; by which said writ, the said lady the now Q. then commanded the Sheriffs of London, that the bodies of the within named Tho. Smith, Edward Winter, and Anthony Bustard, if they were laymen, should be taken, and in the prison of the said lady the Q. be safely kept, until the said Tit. Westby of the debt aforesaid should be fully satisfied; and all the lands and chattles of the said Tho. Edw. and Anthony, in the bailiwick of the said Sheriffs, by the oath of honest and lawful men of the said bailiwick, by whom the truth of the matter might be better known, according to the true value thereof, they should diligently extend and apprise, and into the hands of the said lady the Q. they should cause to be seised, that the same to the aforesaid Titus, until he should be fully satisfied of the debt afores. they might be delivered according to the form of the stat. at Westm. for the like debts to be recovered, thereof made and provided; and how the said Sheriffs should have executed the said command, that they should make known to the said lady the Q. in her Chancery, in 15 days of St. Martin then next following, wheresoever she should then be, by their letters sealed, and that they should have then there that writ, Which said writ, the
said

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saïd jurors say upon their oath aforesaid, that the saïd Titus Westby afterwards, that is to say, on the within written 8th day of September, in the 30th year afores. at London afores. that is to say, in the within written parish of Christ-Church in the ward of Farringdon within, delivered to the saïd Tho. Skinner and John Catcher, then being Sheriffs of London, in form of law to be executed, in manner and form as the afores. Titus within likewise against them hath declared: and further the jurors afores. say upon their oath afores. that the saïd Anthony Bustard then, that is to say, on the aforesaid 8th day of September, in the 30th year afores. was in the gaol of the saïd lady the Q. that now is of Newgate, under the custody of the saïd Tho. Skinner and J. Catcher, then Sheriffs of London afores. in execution at the suit of one Rob. Dighton, for a debt of 240l. and the saïd Anthony Bustard so being there in execution, the saïd Thomas Skinner and John Catcher, then being Sheriffs of London within written, on the 8th day of September, in the 30th year aforesaid, by virtue of the writ aforesaid, at London aforesaid, took and arrested the within named Anthony Bustard, in manner and form as the saïd Titus within likewise against the saïd Thomas Skinner and John Catcher hath declared; and that the saïd Anthony Bustard being so taken and arrested, under the custody of the saïd Thomas Skinner and John Catcher, then Sheriffs of London aforesaid, in form aforesaid, the saïd then Sheriffs of London, the saïd Anthony Bustard, in execution for the aforesaid 440l. then and there had, according to the command of the saïd writ: and moreover, the jurors afores. say upon their oath aforesaid, that the saïd Anthony Bustard being so in custody of the saïd Thomas Skinner and John Catcher, for the aforesaid 440l. and for the aforesaid other debt of 240l. owing to the saïd Robert Dighton, in form aforesaid, the saïd Thomas Skinner and John Catcher afterwards, that is to say, on the within written 20th day of October in the 30th year aforesaid, in the going out of their office aforesaid, the saïd Anthony Bustard, by indenture delivered to Hugh Offeley and Richard Saltonstall, in execution for the aforesaid debt of the saïd Robert Dighton, without any mention of the saïd execution of 440l. made to the aforesaid Hugh Offeley and Richard Saltonstall, or to either of them given or notified. And further, the saïd jurors say upon their oath aforesaid, that then, that is to say, on the 20th day of October in the 30th year aforesaid, the saïd Thomas Skinner and John Catcher from their office aforesaid, were discharged. And further, the saïd jurors say upon their oath aforesaid, that after the saïd Thomas Skinner and John Catcher,
from

from their office aforef. in form aforef. were discharged, that the faid Anth. Bultard, without payment of any of the aforef. debts, in the custody of the aforef. Hugh Offeley, and Rich. Saltonftall, in form aforef. being for the faid 240l. the faid Hugh Offeley and Rich. Saltonftall, having none, nor either of them ever having any notice to them, or either of them given of the faid execution of the aforef. 440l. at London aforef. fuffered the faid A. Bultard to go at large out of the faid prifon where he would: but whether upon the whole matter aforef. in form aforef. found, the faid Tho. Skinner and John Catcher ought to be charged for the aforef. debt of 440l. in law, or not, the jurors aforef. are altogether ignorant. And they pray the advice of the court of the faid lady the Q. before the Q. herfelf being. And if it fhall feem to the faid court, that the faid Tho. Skinner and John Catcher, ought to be charged for the faid 440l. in law, upon the whole matter above found, the faid jurors fay upon their oath aforef. that the faid Tho. Skinner and John Catcher do owe to the faid Titus Westby the faid 440l. in manner and form as the faid Titus within againft them hath declared: and they do alfo affefs the damages of the faid Titus Westby by occafion of detaining of the faid debt, befides his charges and cofts by him about his fuit in this part expended, to 20l. and for his charges and cofts to 53s. and 4d. And if it fhall feem to the court aforef. that the faid Tho. Skinner and John Catcher do not owe to the faid Titus Westby the faid 440l. in manner and form, as the faid Tho. Skinner and John Catcher within by pleading have alledged, then, &c. And becaufe the court of the lady the Queen now here, of their judgment of and upon the premises to be given, are not yet advifed; day is given to the parties aforef. before the lady the Q. at Weftm. until Tuefday next after 8 days of St. Michael, to hear their judgment thereof, &c. becaufe the court of the lady the Q. here thereof are not yet, &c. Before which day, the plaint aforef. was adjourned by the writ of the lady the Queen, of Common adjournment, before the lady the Q. at Weftm. until from the day of St. Michael in one month; at which day the plaint aforef. was further adjourned by another writ of the faid lady the Q. of Common adjournment, before the lady the Q. until the morrow of All Souls then next following, at the caftle of Hertford in the county of Hertford. At which day, before the lady the Queen at the caftle of Hertford, came the parties aforefaid, by their attornies aforefaid: and becaufe the court of the lady the Queen here, of giving their judgment of and upon the premises is not yet advifed, further day is given to the parties aforefaid, before the lady the Queen at the caftle

castle of Hertford afores. until Tuesday next after 8 days of St. Hil. to hear their judgment thereof, because the court of the lady the Q. here thereof are not yet, &c. And so from term to term until Thursday next after 8 days of St. Hil. to hear their judgment, &c. because the court of the lady the Queen here, &c. At which day before the Q. at Westm. came the parties afores. by their attornies afores. upon which all and singular the premises being seen, and by the court of the lady the Q. here being fully understood, and mature deliberation thereof had, because that it seems to the court of the said lady the now Q. here, that the said Thomas Skinner and John Catcher ought to be charged for the said 440l. It is considered, that the said Titus Westby do recover against the afores. Tho. Skinner and John Catcher his debt aforesaid and his damages afores. by the jurors afores. in form afores. assessed, and also 10l. 13s. and 4d. for his charges and costs aforesaid to the said Titus, by the court of the said lady the Q. here, with his assent of increase adjudged, which damages in the whole do amount to 33l. 6s. and 8d. and the said T. Skinner and John Catcher, in mercy, &c. Afterwards, that is to say, upon Monday the 10th day of February, in the 37th year of the reign of the said lady the now Q. the transcript of the record, and proceedings between the parties aforesaid, with all things touching the same, by a certain writ of the lady the Q. of correcting errors, by the said Thomas Skinner and John Catcher, in the premises, was brought to the Justices of the lady the Q. of the Common Bench, and the Barons of the Exchequer, of the lady the Q. in the chamber of the Exchequer afores. according to the form of a stat. made in the Parliament of the said lady the Q. held at Westm. the 23d day of Nov. in the 27th year of her reign, in the same court of the said lady the Q. here before the Q. herself were transmitted, the afores. Tho. Skinner and John Catcher, in the court of the Exchequer afores. assigned divers matters for errors, in the record and proceedings afores. for the revoking and annulling of the judgment afores. to which the said Titus, in the said court appearing pleaded, that neither in the record, nor in the proceedings afores. for the revoking and annulling of the judgment afores. in any thing was there error: and afterwards, that is to say, on Monday the 20th day of Oct. in the 37th year of the reign of the said now Q. the premises being seen, and by the court of the said lady the Q. there diligently examined and fully understood, as well in the record and proceedings aforesaid as in the judgment upon the same given, as in the cause aforesaid for error by the said Thomas and John above assigned and alledged, it seemed to the court there that the record afores. was in nothing vicious or defective. and that in the record aforesaid, there is no error there-

thereof. it was then and there considered in the same court, that the judgment afores. should be affirmed in all things, and stand in all its force and effect, the said causes for error there assigned in any thing notwithstanding: and farther it was considered that the said Titus should recover against the said Thomas and John 80s. to the said Titus, by his assent, by the said court of the lady the Q. there adjudged, according to the form of the stat. lately made and provided for his costs and charges, which he hath had by the reason of the delay of the execution of judgment afores. by colour of prosecuting the said writ of error, &c. And thereupon the record afores. as also the proceedings thereon before the Justices of the Com. Bench and the Barons of the Exchequer afores. in the premises had, were sent back before the Queen, wheresoever, &c. by the Justices and Barons afores. according to the form of the stat. aforesaid, &c. And in the same court of the said lady, now here before the Queen herself, they remain, &c.

W E S T B Y's Case.

Michaelmas 39 and 40 Eliz.

Adjudged in the King's Bench, but the plea began Hil. 34 Eliz. Rot. 169.

Cro. El. 685.
Poph. 85. Moor
688.

JOHN WESTBY brought an action of debt against Skinner and Catcher, late Sheriffs of London, for an escape; and the case was, one Bustard was severally in execution under the custody of the defendants, then Sheriffs of London, as well at the suit of one Dighton, as at the plaintiff's suit, and the defendants, at the end of their year, delivered over the body of Bustard, amongst others, to the new Sheriffs by indenture, in which indenture the execution at the suit of Dighton was mentioned, but the execution at the suit of the plaintiff was omitted. and afterwards Bustard (always being in gaol) in the time of the new Sheriffs, escaped. And if the defendants should be charged with this escape was the question. And it was strongly objected on the defendants part, that they could not be charged. For they had delivered the body of the defendant then being in the gaol to the new Sheriffs, and therefore the escape did begin in their time, for which they ought to be charged, and not the old Sheriffs; and for as much as the new Sheriffs had the party in their custodies, they ought at their peril to take notice of all executions (being matters of record) against him, and ought to keep him till all are satisfied. But it was adjudged that the defendants being the old Sheriffs should be charged; and in this case four points were resolved unanimously *per totam curiam*.

1 Sid. 335.
2 Leon. 54.

Cro. Jac. 588.

1. That when the body of Bustard was delivered to the new Sheriffs as in execution at the suit of Dighton only, he was thereby out of custody of the old Sheriffs; and he could not be in the custody of the new Sheriffs for the plaintiff's execution, because he was not delivered to them, nor they charged with him for the plaintiff's execution; and

and although he was within the walls of the prison, yet it was an escape in law as to the plaintiff: for the plaintiff, in whom was no default, ought not to be without remedy in this case; but because the default was in the defendants, in as much as they omitted the plaintiff's execution in (a) their indenture, for this cause it is reason that they should be charged: and as to that which was asked, when the escape began in this case? it was answered and resolved, that *eo instante*, that the old Sheriffs delivered their prisoners to the new Sheriffs, they cease to have the custody of any of them; and *eo instante* doth the escape begin as to the plaintiff. So, reader, you may observe, that the law doth adjudge one, who remains in prison, to escape. See Plow. Comm. 37. Plat's case, the opinion of (b) Chomley Chief Baron.

(a) Cr. Jac. 588.
2 Rol. Rep. 146.

(b) Plowd. 37. a.
2 Ventris 19.

2. It was resolved, that the old Sheriffs ought to give notice to the new Sheriffs of all the executions which are against any who are in their custody; although the executions be of record, yet the new Sheriffs should not take notice of them at their peril, but should be charged only with such whereof the old Sheriffs gave them notice: for it was observed, that in the general case of Sheriffs of England, when the King makes a (c) new patent to another to be Sheriff, although the old Sheriff had his office but *durante bene placito*, yet it appears by the register, that presently after the patent a writ *de comitatu commissi*, which is commonly called a writ of discharge, issueth: the effect of which writ is, *rex omnibus ad quos, &c. salutem: sciatis quod commisimus dilecto nobis S. (who is now Sheriff) com' nostr' N. cum pertinentiis custodiend', quamdiu nobis placuerit, &c. In cujus rei, &c.* And then is another writ directed to the old Sheriff, and the effect thereof is, *et mandatum est N. nuper vic' com' prædict' quod eidem S. com. prædict' cum pertinen', una cum rotulis, brevibus, memorandis, & omnibus aliis officium illud tangent' quæ in custodia sua existunt, per indent' inde modo debet' conficiend' liberet custodiend' in forma prædict', teste, &c.* And all this appears in the Register (d) 295. a. & b. by which appears the great care the law hath of executions, which are the fruit of every suit. But it was resolved, that till the prisoners are (e) delivered to the new Sheriffs, they remain in the custody of the old Sheriffs, notwithstanding the new letters patent, the writ of discharge, and the writ of delivery. And although it was said by some in the case at bar, that if the old Sheriffs had given notice to the new Sheriffs by (f) parol of the plaintiff's execution, it had been sufficient; yet it appears by the (g) Register, that the new Sheriff may compel the old Sheriff to make the delivery by indenture. Note; in London, the mayor and

(c) Cr. El. 12.

(d) Cr. El. 366.
9 Co. 98. a.

(e) Cr. Jac. 588.
1 Bulstr. 70, 75.

(f) Moor 689.
(g) Cr. El. 366.

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commonalty have the office of Sheriffs of London and Middlesex by charter, and two Sheriffs are yearly chosen: so that it was agreed, that after their election, and before the delivery over of the prisoners to the new Sheriffs, they remain in custody of the old Sheriffs.

(a) Cr. El. 365.
366. Poph. 85.
Winch 103.

3. It was resolved, that if the Sheriff hath in his custody divers persons in execution, and dies, and afterwards a new Sheriff is made, he must take notice at his (a) peril of all the executions which are against any person which he finds in the gaol; and that for necessity; for there is no person to make delivery of them to him, or to give him notice: and there is no mischief to the Sheriff if he keep them well, until he have perfect notice of all the executions; but if he might with impunity suffer those who are in execution to escape, great inconvenience would from thence ensue.

(b) 1 Mod. Rep.
14 Hardres 35.

(c) Hardres 35.

(d) Antea 52.

4. It was resolved, if the Sheriff (b) dies, and before another is made, one who is in execution breaks the prison and goes at liberty, it is no escape; for when the Sheriff dies, all the prisoners are in the (c) custody of the law till a new Sheriff be made; and therefore, although they were in the *interim* out of the walls of the prison, yet the law hath the custody of them, and keeps them in execution without any (d) fresh suit, in what place soever they are, and they may be taken in execution at any time after. For no escape can be in prejudice of the plaintiff, but when some person may be charged for it, and the law deceives no man.

The Case of the Dean and Chapter of NORWICH.

Mich. 40 and 41 Eliz. in Chancery.

KING H. 8. by his letters patent bearing date 2 *Maii*, anno Regni sui 30. *Authoritate sua regia, ac auctoritate sua in terra supremi capitis ecclesiæ Anglicanæ, qua tunc fungebatur, de gratia sua speciali, &c. cœnobium de priore & conventu ecclesiæ cathedralis sanctæ Trin. Norwici in decanum & capitulum ecclesiæ cathedralis sanctæ Trin. Norwici transposuit & mutavit.* And by the said letters patent the King discharged the prior and convent by their special and particular names, *tam de habito suo, quam de regula,* (the said priory being of the order of St. Bennet :) *ipsoque decanum, præbendarios, & canonicos in ecclesia prædicta realiter posuit & constituit, & concessit eisdem decano, præbendariis & canonicis; quod ipsi & successores sui sub nomine, & per nomen decani & capituli ecclesiæ cathedralis sanctæ Trin. Norwici, sint de cætero imperpetuum unum corpus corporat' in re & nomine; ac eosdem decanum & capitul' perpetuis temporibus duratur' incorporavit, &c. Et ulterius concessit quod idem decanus & capitulum, & successores sui omnia & singula dominia, maneria, terras, & hæreditament' quæcunque, &c. quæ ad prædictum nuper priorem in jure ecclesiæ cathedralis prædictæ spectabant & pertinebant, habere, tenere, gaudere & possidere sibi & successoribus suis imperpetuum, &c. possint & valeant, &c.* And further granted, that they should be the chapter of the Bishop of Nor-

K

wich,

2 And. 120, 165.
4 Inst. 257.
1 Jones 166, 167.
1 Co. 126. a.
Palm. 491.
Treby's argument in Quo warranto 8.
Winch 38.
Ley 74.

Dean and Chap. of NORWICH's Case. Part III.

wich, and his successors. And on the sight of the foundation, and divers other ancient instruments of the said priory, it was a great question who was founder, *scil.* the King or Herbert, formerly Bishop of Norwich. But it was admitted without any prejudice to any party, that Herbert was founder; and afterwards the said dean and chapter by their deed enrolled surrendered to King Edw. 6. in the second year of his reign their church and all their possessions: and afterwards the King in the same year incorporated them again, *per nomen decani & capituli ecclesie cathedralis sancte & individue Trinitatis Norwici, ex fundatione regis Edw. 6.* And afterwards the King in the same year regranted their church and all their possessions (except certain manors, &c.) to them by the name of Dean and Chapter, *ecclesie cathedralis sancte & individue Trinitatis Norwici,* (omitting these words, *ex fundatione Regis Edw. 6.*) and to their successors. And one William Downing and other needy and indigent persons, who endeavoured to repair their poor declining estates by the dissolution of the said cathedral church, and of all the possessions of the said dean and chapter, did pretend that the said cathedral church and all the said possessions were concealed from the Queen: and that they were (in the Queen's great deceit under general and obscure words) passed by letters patent of concealment. And they did pretend that these possessions were concealed for two causes:

See Arthur Legar's Case. 10 Co. 109, &c.

First, That the said translation was void; and then the old corporation of prior and covent remained till the death of all the monks (which happened *cor' anno* 18 El.) And that by the death of all the monks, the said possessions came to the Queen by the stat. of 31 H. 8 of Monasteries.

2 And. 120, 121, 166, 165, 167.
1 Jones 166, 167, 170. Palm. 492, 494, 495, 503.
Cr. Car. 170.
Postea 75. a. 76.
a, Hob. 124.

Secondly, Admitting that the translation was good, yet by the said surrender made to King Edw. 6. the King was seized of all their possessions, and the re-grant aforef. was void: for the said misnomer of the corporation of the dean and chapter, *scil.* by reason of the omitting the said words (*ex fundatione Regis Edw. 6.*) And this great case concerning a cathedral church and all the possessions thereof, and concerning the interest mediately and immediately of a great number of the farmers and lessees, was by the command of the Q. (who was very greatly offended that she was so deceived, and especially concerning a cathedral church, which was of the erection of her most happy father) she herself also much favouring the said cathedral church, referred it to Sir Tho. Egerton, Keep. of the Great Seal, Popham and Anderson Ch. Justices, and Periam Chief Baron. And now Mich. 40 & 41 El. at the L. Keeper of the G. Seal's house, called York-house, before them this case was argued

argued by the counsel of the said concealers : and the effect of their objections and arguments here follow.

First, They did admit that the said priory was of the foundation of Herbert formerly Bishop of Norwich ; and then they said, that for as much as the founder was not party to the said translation, the said translation was void. And to prove that the founder of a priory hath such interest that he ought to join, divers books were cited ; that is to say, 39 H. 6. 14. 50 Ed. 3. 27. a. 11 Ed. 3. *Quare impedit* 157. 22 H. 6. 25. b. 9 H. 6. 33. 24 Ed. 3. 77. b. 30 Ed. 3. 21. b. 6 E. 3. 34. A *Quare impedit* brought by the founder of a priory. But as to this point, it was answered by Coke, Attorney General, that first, if the King was founder, as he affirmed on the sight of the foundation and other records he was, notwithstanding the admittance in (a) 3 H. 7. then the case is without question. But admitting that the Bishop was founder, yet the translation was good ; for it appears by the old books, that the * Pope might have discharged a monk, or other dead person in law of his profession, as appears in (b) 3 H. 6. 23. by Martin, 26 H. 6. (c) Nonability, (d) 14 H. 8. 16. b. &c. And by consequence by the stat. of 25 H. 8. cap. 21. King H. 8. might do it ; and accordingly he hath discharged the said prior and monks of their order and profession, and translated them into dean and chapter by the said letters patent, and so none of the said books, which were cited by the adverse party, can be applied to this case. Also there is not any prejudice to the founder, for he remains founder notwithstanding this translation ; and nothing is altered but only the order and profession ; and where the prior and covent was the chapter of the Bishop, now the dean and chapter supply it ; and this priory was eligible and not presentable, as it was agreed on both sides : and that this translation was good, the case of 11 Eliz. Dyer 280. (e) Corbet's case proves it ; where the case was of the translation of this same deanery ; and by the judgment of the parliament in 33 H. 8. cap. 29. it appears, that such (f) translations made by King H. 8. from prior and covent into dean and chapter were good. Further it appears (g) 17 E. 3. 40. & 10 E. 3. 1. a. that all chapters were monks, and notwithstanding the (h) translation of them into prebendaries or canons, and change of their habit, the advowson did remain as it was before ; and for such translations, see 36 (39) H. 6. 13. 38 Aff. 22. 49 Aff. 8. 49 E. 3. 14. 20 E. 3. Nonability 9. 22 R. 2. Breve 936. 14 H. 4. 10. 7 E. 4. 32. But admitting this translation were imperfect or void for this or any other cause, yet it is made good by the stat. of (i) 35 El. c. 3. in which the preamble which declares the mischiefs, and the parts of the purview and body of the act are to be considered. It appears by the preamble, that divers doubts and ambiguities had been moved concerning two things.

(a) 3 H. 7. 6. b.
Br. Return de
Brief 116.
* 1 Jones 160.

(b) 3 H. 6. 24. a.
per Martin.
(c) 26 H. 6.
Nonability 13.
1 Co. 24. a.
(d) 14 H. 3. 17. a.

(e) Palm. 493,
495. Dyer 280.]
Pl. 11, 12.
(f) 4 Co. 87. b.
1 Sand. 344.
6 Co. 66. a.
Moor 581.
(g) 17 E. 3. 40. b.
per Parn.
(h) Co. Lit.
102. b.

(i) 11 Co. 11. a.
2 And. 121.

Dean and Chap. of NORWICH's Case. Part III.

1. Touching surrenders, grants and conveyances made to King Hen. 8. by abbots, priors and other religious and ecclesiastical persons, after the 4th day of Feb. 27 H. 8.

2. Touching the validity of erections of such deans and chapters, and colleges, which were erected, ordained, made or founded, by H. 8. after the said 4th day of Feb. to explain and remove which doubts, two remedies were provided by the said act, first, to settle and establish all the possessions of such religious persons in the King. Secondly, To perfect and establish the deans and chapters and colleges, erected, founded, incorporated or endowed by K. H. 8. as is aforesaid. And this case is within the latter clause; for first, when the King created them into dean and chapter, *viz.* from regular to secular, here is a dean and chapter newly erected and created by the King: also it is within this word "incorporate:" for without question, the King by his said letters patent hath incorporated them *per nomen decani & capituli, &c.* And in two places of the said foundation the King uses the word of the said act, *viz.* (*corporamus*); and it is to be well observed, how beneficially and learnedly the statute of 35 Eliz. is indited, for the remedy of the said doubts and ambiguities. For the act doth not make all erections, foundations, &c. made by King H. 8. &c. good, &c. for then it might have been objected, that there was not any erection, foundation, &c. in law, *et quod contra legem factum est, pro infecto habetur*: And yet such objection (if the act had been so penned) had been material: but in our case to take away all objections, the words of the act are, "All letters patents made, &c. for the erection, foundation, incorporation or endowment of any dean and chapter, or college, were and shall be reputed, taken and adjudged to have been good, perfect, and effectual in law, for all things therein contained, according to the true intent and meaning of the same: any thing, matter, or cause to the contrary thereof in any wise notwithstanding."

And without question the said letters patent of 30 H. 8. were made "for the erection and incorporation of the dean and chapt." And the said letters pat. are by the act adjudged to be good "for all things therein contained;" and in them is contained not only their incorporation into a dean and chapter, but also a grant to them and their successors, that they shall enjoy and have all lordships, manors, lands, &c. as appears by the charter before: so that the incorporation, and all that is contained in the said letters patent is adjudged good: and it is also adjudged by parliament that they shall enjoy all the lord-

Co. Lit. 250.

4 Co. 31. a.

lordships, manors, lands, &c. which were parcel of the possessions of the priory aforesaid; and there is no saving but only for rights, &c. before the 4th day of Feb. anno 27 H. 8. So it is manifest that this act of 35 Eliz. being an act of explanation (which always is beneficially to be interpreted) adjudges the corporation good, and establishes their possessions in them against all titles which might accrue to the King or any other after the 4th day of Feb. anno 27 H. 8. And therefore all those, who pretend to any title by any letters patent of concealment, are for ever barred of all pretences and claims which they can make to any of these possessions.

Secondly, it was objected, that although the translation was good, yet the said dean and chapter had not any estate or right in the said possessions; for by their surrender to K. Ed. 6. of their said church, and all their manors, lands, and possessions, the King was seised of them in fee; then the King newly incorporated them, *per nomen decani & capituli ecclesie cathedralis sancte & individue Trinitat' Norwicens. ex fundatione Regis Ed. 6.* And afterwards the said King re-granted their possessions to them by the name of dean and chapter *sancte & individue Trinit' Norwici*, omitting these words (a) *ex fundatione Regis Edw. 6.* which grant was void, as it was objected, by reason of the misnomer of the corporation, in as much as the name of the founder, being a material part of the name of the corporation, was omitted.

To which it was answered by the Attorney General, that the said dean and chapter had good estate and right in the said possession for divers causes.

1. Although they had (b) surrendered their church and possessions, yet their corporation continued, and they remained the chapter of the Bishop; for although there cannot be a warden of a chapel, if the chapel and all the possessions be aliened, as seems by (d) 15 Aff. 8. because he cannot be warden of nothing, yet that is not like, nor can be applied to the case now in question. And for the better apprehending thereof, it was said, that inasmuch as it was impossible that the church of God should continue without sects and heresies, it was in christian policy thought and re-thought necessary, that every Bishop should be (e) assisted with a council, *scil.* with a chapter, and that for two reasons:

1. To consult with them in matters of difficulty, and to assist him in deciding of controversies concerning religion, to which purpose every Bishop *habet cathedram.*

2. To consent to every grant, &c. which the Bishop should make to bind his successor. For it was not reasonable to impose so great a charge, or to repose such confidence in any single person, or to give power to one person,

1 Black. Com.
ch. 11. fol. 382.

(a) Hob. 124.
Cr. Car. 170.
Antea 73. b.
2 And. 120, 127,
165, 166, 167.
1 Jones 166, 167,
170. Palm. 92,
494, 495, 503.
Postea 76. a.

(b) Davis 1. b.
1 Jones 168.
2 Roll's Rep.
453. Palm. 492.
Treby's argu-
ment in Quo
warranto 10.
Pollexfen's argu-
ment in Quo
warranto 99.
Postea 76. b.
(c) Palm. 493.
(d) Palm. 493.
494, 495, 500,
501, 502. 2 Rol.
Rep. 453. Davis
1. b. 10 Co. 29.
a.
(e) Co. Lit. 94. a
2 Rolle's Rep.
453.

Dean and Chap. of NORWICH's Case. Part III.

(a) 10 Co. 28.b.
Palm. 495.
Cr. El. 79.

(b) Dy. 61. pl.
30. Cr. El. 79.

(c) Palm. 501,
502, 493. 494.
Dav. 1. b.
B. N. C. 170.

(d) 1 Jones 168.
Palm. 494. 501,
502. 2 Rolle's
Rep. 453.

(e) Dyer 273.
pl. 35, 36, &c.
2 Keb. 167.
2 Rolle's Rep.
103. Dav 46. b.
3. a. Styl. 181.
Treby's argu-
ment in Quo
warranto 10.
(f) 5 Co. 14. b.
Caudry's Case.
Co. Lit. 134. a.
Davis 81. a.

only to prejudice his successor. And therefore it appears in 25 Aff. 8. 17 E. 3. 40. 10 E. 3. 10. 50 E. 3. 16. that at the first all the possessions were to the (a) Bishop, afterwards a certain portion was assigned to the chapter; *ergo*, the chapter was before they had any possessions. And of common right the Bishop is (b) patron of all the prebendaries, because their possessions are derived from him; *et præbenda dicitur a præbendo, quia præberet auxilium episcopo*; so that although the dean and chapter depart with their possessions, yet, for necessity, the corporation doth remain as well to assist the Bishop in his office, as to give their assent to the estates, &c. which he shall make, &c. of his temporalties; and so long as the bishoprick remains, they being his chapter and council, they may well remain, although they have not any possessions, and shall be now as they were at the first, without any possessions; and especially when the bishoprick may consist wholly of spirituality, as Stouff saith in 10 E. 3. 1. b. in the case of the Bishop of Norwich, and 25 Aff. 8. by Fisher. And in 17 E. 3. 59. the prior and Friars Carmelites had not any place nor possessions: and Br. tit. (c) Corporation 78. anno 32 H. 8. Fitz. held, that if an abbot or prior and convent sold all their possessions, yet the corporation remained, which, without question, is good law, if they were the chapter to a Bishop. And in 15 Aff. 8. it is held that if the body of a prebend be a manor, and no more, and the manor be recovered from him by title paramount, yet his corporation doth remain; for he hath *stallum in (d) choro, & vocem in capitulo*, and he is a prebendary, although he have not possessions; which is all one with our case, for all the chapter are prebendaries.

Also the attorney said, that it appeared in this very case; that after the dean and chapter had granted and surrendered their church and possessions to King E. 6. the King by his letters patent incorporated them *per nomen decani & capituli ecclesiæ cathedralis sanctæ & individue Trinitatis Norwicensis ex fundatione Regis E. 6.* And three days after, the King by other letters patent granted their church and possessions as is aforesaid; by which and many other like foundations it appears, that there may be a dean and chapter without a church or any possessions; and if the law should not be so, many great inconveniencies would ensue. And in 10 Eliz. Dyer (e) 273. although the dean and chapter of Wells, by express words, granted and surrendered *diaconatum de Wells, &c.* yet it was not thought sure till the grant and surrender was established and confirmed by act of parliament.

And although all bishopricks were of the (f) foundation of the Kings of England, and therefore in ancient time they were donative, and given by the Kings, as appears in 17 E. 3.

40. and by the statute of 25 E. 3. (a) *de provisoribus*, yet afterwards (as it appears by the said book and the said (b) act) the bishopricks became, by the grants of the Kings, (c) eligible by their chapters: and therefore, if by the surrender of the dean and chapter, their corporation should be dissolved, it would introduce three inconveniencies; 1. To the Bishop concerning his assistance in his episcopal function: 2. To the Bishop and others, touching the confirmation of his grants: 3. To all the church in general; for how shall the Bishop be chosen in such case? and therefore to shun such and many other inconveniencies, it was concluded that the corporation made by King H. 8. did remain, and so the grant made to them by such name was good. *Vide* (c) F. N. B. 195. that the Bishop and chapter are but one body, although their possessions be several. But to make this case clear, the Attorney moved, that admitting the corporation newly made by King E. 6. was good, and that their old corporation was surrendered, and that the said words which were omitted, *scilicet* (d) *ex fundatione Regis E. 6.* were material, and not words of ornament only; yet the King's grant to them was good; notwithstanding this misnomer, by the statute of 1 E. 6. cap. 8. of Confirmations; which statute recites, that where King E. 6. had made divers grants, "as well to bodies politick and corporate, as to divers and sundry of his loving and obedient subjects, &c. in avoiding of which sundry and many ambiguities, &c. have or might be moved, &c. for lack of true naming of the same bodies, politick or corporate;" it is enacted, that all such grants made, or during his life to be made, shall be good, notwithstanding any of the causes above-mentioned: "so that the lack of the true naming of the same corporation," viz. to which the King had made, or after should make any grant, is remedied by the express words of the said act.

And after these arguments, on conference between the Lord Keeper of the Great Seal, and the said Justices, and after great consideration had by them of the said points, it was unanimously agreed and resolved by them, that if any imperfection were in the said translation, that the said act of 35 Eliz. had made it without question good. And so it was resolved, as to this point, in this very case of the dean and chapter of Norwich, Mich. 35 & 36 Eliz. at St. Alban's, by all the Judges of England.

2. If the corporation of the dean and chapter made by K. H. 8. was gone by the said surrender made to K. Ed 6. And if the misnomer was material, and not an additional ornament; yet it was unanimously resolved and agreed, that the said act of confirmation of 1 E. 6. had made it good, notwithstanding the said misnomer: and on these two points they resolved without any question.

K 4

3. It

(a) 1 Jones 160
5 Co. 17. 2.
Caudrey's Case.
(b) 25 H. 8. c.
22. Co. Lit.
134. a.

(c) Fitz. N. B.
194, 195. L.

(d) Antea 73. b.
75. a. Hob. 124.
Cr. Car. 170.
1 Jon. 166, 167,
170. Palm. 492,
494, 495, 503.
2 And. 120, 121,
165, 166, 167.

2 And. 121.

Dean and Chap. of NORWICH's Case. Part III.

(a) Pollexfen's
argument in Quo
warranto 99.
Dav. 1. b. An-
tea 75. a.
2 Roll. Rep. 453.
Palm. 492.
Treby's argu-
ment in Quo
warranto 10.

3. It was held by the Lord Keeper of the Great Seal and the Justices, that the old corporation of dean and chapter did remain, notwithstanding the said surrender (a) of their church and of all their possessions.

Note, reader, the great assurance and establishment which is made by the good and strong act of parliament of the said most illustrious and most noble Queen Elizabeth, in the said 35th year of her reign, not only of all foundations of cathedral churches and colleges in any manner founded or translated, or mentioned to be founded or translated by King H. 8. but also to all subjects who have any estate or interest in any of the possessions of any abbot, prior, or any other such religious persons, notwithstanding they made not any surrender to King H. 8. or that their surrender was insufficient; or that the record thereof be now imbezzled or lost; and notwithstanding divers other such like defects; all which are remedied by the said most excellent act of parliament, the fatal plea to all concealments as to these possessions. And although these resolutions properly concern the meridian of the cathedral church of Norwich; yet they will very well serve as well for many other cathedral churches, as for divers colleges in the universities of Cambridge and Oxford.

FERMOR's

FERMOR's Case.

Hil. 44 Eliz,

In the Chancery.

IN a case depending in Chancery, between Rich. Fermor, Esq. plaintiff, and Tho. Smith defendant, on the hearing the cause before Sir Tho. Egerton, Knt. Lord Keeper of the Great Seal, the case was such: Rich. Fermor the plaintiff being seised of the manor of Somerton in fee, by indenture 6 Junii 20 Eliz. demised a messuage, parcel of the same manor, to Tho. Smith, the defendant, for 21 years, rendering the yearly rent of 3*l.* during the term, by force of which the defendant entered and was thereof possessed: he was also possessed of divers other parcels of the said manor at the will of the plaintiff, rendering 20*s.* *per ann.* and held divers other parcels of the said manor by copy of court-roll according to the custom of the said manor, rendering 40*s.* rent *per ann.* all which lay in Somerton: and the said Tho. Smith was seised in his demesne as of fee of divers lands in the same town which were his proper inheritance. And afterwards by his deed 15 Octob. 25 Eliz. demised the said house and all the said land which he held for years, at will, and by copy to one Chappel for his life, *Pasch.* 35 Eliz. Smith levied a fine with proclamations of as many messuages and lands, as comprehended as well all the lands which he held for years, at will, and by copy, as his own inheritance, by covin and practice, to bar the plaintiff of his inheritance; the proclamations and five years passed, Smith at all times, before and after the fine, continued in possession, and paid the said several rents to the plaintiff. Chappel died, the 21 years expired, and

Carth. 102.

415.

2 Anderf. 176.

Jenk. Cent. 253.

Cary's Rep. 20.

Lit. 127.

1 Jones 35.

2 Bulst. 139.

Winch 116,

117, 118.

2 Bulst. 318.

9 Co. 105. b.

Raym. 149.

1 Jones 317.

Covin.

and now Smith claimed the inheritance of the land which he held by lease, at will, and by copy, and would have barred the plaintiff by force of the said fine with the proclamations, and five years past. And the Lord Keeper of the Great Seal thinking and considering of the great mischiefs which might ensue by such practices, and on the other side considering that fines with proclamations are the general assurances of the realm, referred this case (being a thing of great importance and consequence) to the consideration of the two Chief Justices Popham and Anderson; and after conference between them they thought it necessary that all the Justices of England and Barons of the Exchequer should be assembled for the resolution of this great case. And accordingly in this same term, all the Judges of England and the Barons of the Exchequer met at Serjeants Inn in Fleet-street, at two several days, where the case was debated among them. And at length it was resolved, by the two Chief Justices, Popham and Anderson, and by Gawdy and Walmesly, and all the other Justices of England and Barons of the Exchequer, (except two) that the plaintiff was not (a) barred by the said fine with proclamations, and that for four reasons:

(a) 2 And. 176.
Jenk. Cent. 253.
1 Jones 35.
Winch. 116.
9 Co. 105. b.
1 Jones 317.
(b) 3 Co. 86. b.
87 a. b. 88. a.
b. 89. a. 90. a. b.
91. a. 1 And.
170. 2 And.
176. Co. Lit.
262. a. 9 Co.
105. b. 13 Co.
20. Sav. 85, 88,
106, 107.

1. The makers of the act of (b) 4 H. 7. cap. 24. did never intend that such fine levied by fraud and practice of lessee for years, tenant at will, or tenant by copy of court-roll, who pretend no title to the inheritance, but intend the disinherison of their lessors or lords, should bar them of their inheritance, and that appears by the preamble of the act of 4 H. 7. where it is said, "that fines ought to be of greatest strength to avoid strifes and debates, &c." But when lessee for years, or at will, or tenant by copy of court-roll, makes a feoffment by assent and covin, that a fine shall be levied, this is not to avoid strife and debate, but by assent and covin to begin strife and debate where none was; and therefore the act doth not extend to establish such estate made and created by such fraud and practice.

Carth. 415.

5 Co. 124.

2. It was never the intent of the makers of the act, that those, who could not levy a fine, should by making of an estate by wrong and fraud be enabled by force of the said act of 4 H. 7. to bar those who had right by levying of a fine: for if they themselves without such fraudulent estate could not levy a fine to bar them who had the freehold and inheritance, certainly the makers of the act did not intend that by making of an estate by fraud and practice they should have power to bar them; and such fraudulent estate is as no estate in the judgment of the law.

3. As it is said in Delamer's case, Plowd. Com. 352. b. if any doubt be conceived on the words or meaning of an

an act of parliament, it is good to (a) construe it according to the reason of the common law; but the common law doth so abhor (b) fraud and covin, that all acts as well judicial as as others, and which of themselves are just and lawful, yet being mixt with fraud and deceit, are in judgment of law wrongful and unlawful: *quod alias bonum & justum est, si per vim vel fraudem petatur, malum & injustum efficitur*: and therefore if a woman hath title of dower, which is one of the things favoured in law, and by (c) covin between her and another, causes a stranger to disseise the tenant of the land, to the intent that she may bring a writ of dower against him, which is done accordingly, and the woman recovers against him on a just and good title, yet the whole is void, and of no force to bind the terre-tenant; *a fortiori* in the principal case when the lessee for years makes a feoffment by covin, which amounts to a wrong and disseisin, a fine levied by him who is (d) *particeps criminis*, and who had not, nor pretended to have any right to the land, shall not be a bar to the lessor. And that recovery in dower, or any other real action, upon a good title against the tenant who comes to the land by wrong and covin, are void and of no force, appears by 41 Aff. 28. 44 E. 3. 46. a. 25 Aff. 1. 22 Aff. 92. 11 E. 4. 2. a. 15 E. 4. 4. b. 7 H. 7. 11. b. 18 H. 8. 5. a. 12 Eliz. Dyer (f) 295. For although his right be lawful, and he hath pursued his recovery by judgment in the King's court, yet his covin makes all that unlawful and wrongful, and yet recoveries, and especially on a good title, are much favoured in law: also the right and inheritance of feme coverts and infants, are much favoured in law; and yet if a feme covert, or an infant be of (g) covin and consent, that the discontinuee shall be disseised, and that the disseisor shall enfeoff them; and all this is done accordingly, they are not remitted, as appears by Littleton, chap. Remitter 151. & 19 H. 8. 12 b. And there it is held by six Justices, that in such case, if the (h) disseisor enters by covin to the intent to enfeoff the infant, although the infant be not of covin, &c. yet he shall not be remitted, because he who is *in* by him who makes the covin shall be in the same plight as he who did the covenous act. And it is agreed in 19 H. 8. 12. b. that if a man makes a disseisin to the (i) intent to make a feoffment with warranty, although he makes the feoffment 20 months after, yet it is a warranty which commences by disseisin.

So if one (k) makes a gift in tail to another, and the uncle of the donor disseises the donee, and makes a feoffment with warranty, the uncle dies, and the warranty descends on the donor, and afterwards the donee dies without issue, the donor brings formedon in the reverter, and the tenant pleads the feoffment with warranty, the demandant shall avoid

(a) Postea fo. 85. b.

(b) Postea fo. 82. a.

(c) Co. Lit. 35. a. 5 Co. 30. b. 11 E. 4. 2. a. 1 Sid. 21. 6 Co. 58. a. 8 Co.

132. b. 15 E. 4. 4. b. Co. Lit. 357. b. Br.

Dower 15. 44 E. 3. 46. a. Br. Collusion 20. Lane 44 Fitz.

Dower 42 1 Rol. 549. 44 Aff. 29. 2 Rol. Rep. 17. Perk. sect. 396.

Plowd. 51. a. 18 H. 8. 5. a. Plowd. 54. b. Poph. 64. 100.

(d) 5 Co. 79. b. Co. Lit. 366. b. 14 H. 8. 8. a.

(f) Postea 78. b. 82. a. Dy. 295. pl. 8, 9, 10, &c. Lane 44.

(g) Co. L. 357. a. 18 E. 4. 2. b. Lit. sect. 678.

Lit. 152. b. 5 Co. 80. b. (h) Plow. 48. b. Br. Remitter 1. Lane 44.

(i) 5 Co. 79. b. Cro. Car. 483, 484. 1 Jones 397, 398.

(k) Co. Lit. 366. b. 5 Co. 80. a. 31 E. 3. Garrandy 28.

avoid it, because it began by disseisin, and yet the disseisin was not immediately done to the donor, but to the donee; but by it his reversion was divested; and yet warranties are much favoured in law. And it appears in 8 Eliz. 249. Dyer, that a *vacat* was made of a (a) recovery in the Common Pleas had by covin. The law hath ordained, that he, who will be assured of his goods, shall buy them in open market, and *that* sale will bind all strangers, as well as the seller, and yet it is agreed in 33 H. 6, 5. a. b. that a sale in (b) market overt shall not bind him who hath a right to the goods, if the sale be by fraud, or the vendee hath notice that the property of the goods was another's. So the law hath ordained the court of Com. Pleas as a market overt for assurances of land by fine, so that he who will be assured of his land not only against the seller, but all strangers, it is good for him to pass it in this market overt by fine; for as it is said, (c) *finis finem litibus imponit*: and yet covin and deceit in the case at bar will void it. In 4 E. 2. *cui in vita* 22. it is held, that a resignation made by an Abbot by covin should not abate the writ 34 E. 1. Warranty 88. & 19 E. 2. Affets 3. & 31 E. 1. Voucher 301. a covinous conveyance that (d) affets should not descend, is nothing worth. And it appears in (e) 17 E. 3. 59, & 21 E. 3. 3. 46. that an estate made to the King, and by his letters patent granted over, and all this by covin between him who granted to the King and the patentee, to make an evasion out of the stat. of mortm. shall not bind, but shall be repealed. And 17 Eliz. Dy. 339. (f) a presentat. obtained by collus. is void. And 17 Eliz. Dy. 339. letters of (g) administration obtained by collus. are void, and shall not repeal a former administration: see 13 Eliz. Dyer (b) 295. many cases there put concerning covin.

And thereupon it was concluded, that if a recovery in dower, or other real action, if a remitter to a feme covert or an infant, if a warranty, if a sale in market overt, if the King's let. patent, if a presentat. administrat. &c. *scil.* Acts temporal and ecclesiastical, shall be avoided by covin; by the same reason a fine in the principal case levied by fraud and covin, as is afores. shall not bind; for * *fraus & dolus nemini patrocinari debent*.

Note, reader, in 33 & 34 Eliz. in the King's Bench between Robert Laune plaintiff. and Will. Toker defend. *in ejectione firmæ* of lands in Ilfordcoom in the county of Devon, it was adjudged that where (i) tenant for life levied a fine with proclamation and 5 years pass in his life, that the lessor should have 5 years to make his claim after the death of the lessee; for although this statute of 4 H. 7. hath a saving for the lessor in such case, yet the saving is of such right (as first shall grow, remain, &c.) and the right first accrued to the lessor

(a) Dyer 249.
pl. 841. 1 Rolle's
807. 2 Inst. 215.

(b) Plow. 46. a.
55. a. Post fo.
83. a. Br. Tres-
pass 26. Br.
Collusion 4. Br.
Property 6.
Fitz. Replicat,
15. 2 Inst. 713.
14 H. 8. 8. b.
(c) Co. Lit.
120. b. 262. a.
3 Bulst. 144.
Hardres 121.

(d) 1 Rol. Rep.
169. Dy. 295.
pl. 16.
(e) Lane 47.

(f) Dy. 339. pl.
47. 6 Co. 29. b.
1 Anderf. 38.
2 Rol. 183 188.
190, 354. 1 Rol.
Rep. 236, 467.
Lane 104.

(g) 1 Siderfin
21. 6 Co. 19. a.
8 Co. 135. b.
143. b. Cr. El.
460. 2 Keb. 12.
(b) Antea 78. a.

* Palm, 158.

(i) 1 Jones 35.
Cr. El. 220, 254.
Cr. Car. 157,
200.
1 Jones 211.
Moor 71. 1 Le-
on. 40. Plowd.
373. b.

lessor after the fine and the forfeiture; but notwithstanding that, in as much as by the covin of the lessee, he in reversion or remainder might be barred of his reversion or remainder (for they do not expect to enter till after the death of the lessee) and especially when the lessee hath lands of his own inheritance in the same town (as in the case at bar he had), there the lessor shall have 5 years after the death of the lessee.

So it was agreed in the same case, if * tenant for life makes a feoffment in fee to one who hath lands in the same town, and the feoffee levies a fine with proclamations, it shall not bind the lessor, but he shall have 5 years after the death of the lessee, for the lessor cannot know of what land the fine is levied, for he is not party to the indent. or agreement between the conusor and conusee: so in the said case, the Judges made a construction (a) against the letter of the statute in salvation of the estate and inheritance of him in the reversion. And so it hath been adjudged before in (b) *Some's case* in the Com. Pleas, in Sir James Dyer's time, as Plowden told me. Also it was said that if lessee for years makes a feoffment in fee by practice and covin, that the feoffee should levy a fine with proclamations to another (the feoffee having other lands in the same town) and all this is done accordingly; and yet the lessee doth continually pay the rent to the lessor, it shall not bind the lessor, for the reasons aforesaid.

Lastly, the Judges in this resolution did greatly respect the general mischief which would ensue if such fines levied by practice and covin of those who had the particular interests, should bar those who had the inheritance, and especially in the case at bar, when after the fine levied, the conusor continually payed the rent to the lessor, which made the fraud and practice apparent, and therefore the lessor was secure, and had no cause of any fear or doubt of such fraud. But it was resolved, that if A. purchases land of B. by feoffment, or bargain and sale and enrolls it, and afterwards perceiving that B. had but a defeasible title, and that C. had right to it, B. levies a fine with proclamations to a stranger, or takes a fine from another with proclamations, to the intent to bar the right of C. this fine so levied by consent should bind, for nothing was done in this case which was not lawful, and the intent of the makers of the act of 4 H. 7. was to avoid strifes and debates, and by the express purview should bind all strangers who do not pursue their right by action, or entry within five years. So if one pretending title to land enters, and disseises another, and afterwards with intent to bind the (c) disseisee, levies a fine with proclamations, this fine shall bind the disseisee by the express purview of the act, if he neither enters nor pursues

* 1 Brownl. 250.
2 Rol. Rep. 17.
But, quære if the feoffee had no lands in the same town, whether the fine shall be a bar? because the feoffment of the lessee for years is a disseisin, as it seems to Littleton, sect. 698.
(a) 2 And. 176.
(b) 1 Leon. 214.
Cro. El. 354.

5 Co. 79. b.
Co. Lit. 367. a.

5 Co. 124.

(c) Jenk. Cent.
254. Post 87. b.
1 Brownl. 230.
Cro. El. 896.

pursues his action within five years; and this cannot be called levying by covin, because the levying of the fine is lawful, and the disseisee may re-enter, or bring his action within the five years,

The fourth reason was, because the lessee had contrived his fraud and deceit in so secret a manner, that he had deprived the lessor of the remedy which the statute gave him, that is to say, to make his entry, or bring his action within the five years: for how could he make his entry or bring his action, when he knew not of the feoffment which did the wrong? and as to the fine, inasmuch as the lessee had lands in fee-simple in the same town, every one will presume that the fine would be levied of *that* whereof it might be lawfully levied. And although it contained more acres than his own land, *that* is usual almost in all fines, and preadventure the lessor did not know the just quantity of the lessee's proper land, for that doth not appertain to him; and therefore it would be unreasonable to give him benefit, in this case, of the non-claim of the lessor, when the wrong and covin of the lessee is the cause of his non-claim, and a man shall not take advantage of his own wrong or covin. The possession of the lessee is not any mean for the lessor to take any notice of this wrong, for he comes to the possession of the land by grant or demise lawfully; and after the feoffment he continues in the possession as a lessee, for he pays his rent as a lessee ought, yea, the possession of the lessee, and the payment of the rent, was the cause that the lessor neither knew nor suspected the fraud.

Also it was said, that the fraud and covin in this case made it more odious, because between the lessor and lessee, and the lord and his copyholder, there is a trust and confidence, and therefore a lessee for years, and a copyholder shall do fealty, which is a great obligation of trust and confidence; and fraud and deceit by him who is trusted, is most odious in law. And if the makers of this act had been asked, if their intent was, that such a fine so levied by such practice and covin should bind the lessors, they would have answered, God forbid that they should intend to patronize any such iniquity practised and compassed by those in whom there was trust and confidence reposed. But when a disseisor (although he gains the possession by wrong) levies a fine with proclamation, yet it shall bind as is aforesaid, for a disseisor *venit tanquam in arena*, and it is not possible but that the disseisee to whom the wrong is done, and who hath lost his possession, should be conscious of it; and therefore it will be his own folly if he makes not his claim; and it is not accompanied with fraud and practice by one who came to the possession lawfully, by grant or demise, and who had a trust reposed in him by his lessor or grantor, which fraud and practice is so secretly (a) contrived, that the lessor

for by common presumption could not have notice to make his claim, because his lessee continued in possession, and payed his rent, as a lessee ought. And as to *that* which was objected, that it would be mischievous to avoid fines on such bare averments: it was answered, that it would be a greater mischief, and principally in these days (in which as the poet saith,

———— *Fugere pudor, rectumque, fidesque,
In quorum subiere locum fraudeſque, dolique,
Inſidiæque, & vis, & amor ſceleratus habendi.*)

If fines levied by ſuch covin and practice ſhould bind; ſuch objection may be made, (a) and if a fine be levied to ſecret uſes to deceive a purchaſor, an averment of fraud may be taken againſt it by the ſtat. of 27 Eliz. cap. 4. So if a fine be levied on an uſurious contract, it may be avoided by (b) averment by the ſtatute of 13 Eliz. cap. 8. And Sir Tho. Egerton Lord Keeper of the Great Seal, commended this reſolution of the Juſtices, and agreed in opinion with them.

(a) Plowd. 49. b.
7 Co. 39. b.

(b) Jenk. Cent.
254. 9 Co. 26. b.

[Note alſo, no fine can avoid an antecedent charge, but the eſtate will be bound notwithstanding ſuch fine, &c.]

[See, 2 Black. Com. ch. 11. fol. 356, 357.]

T W Y N E's Cafe.

Mich. 44 Eliz.

In the Star-Chamber.

Moor 638.
Lane 44, 45,
47. Co. Lit. 3.
b. 76. a. 290. a.
3 Keb. 259.
See the stat.
27 Eliz. cap. 4.
post. 2. b.

IN an information by Coke, the Queen's Attorney General, against Twyne of Hampshire, in the Star-Chamber, for making and publishing of a fraudulent gift of goods: the case on the stat. of 13 Eliz. cap. 5. was such; Pierce was indebted to Twyne in 400l. and was indebted also to C. in 200l. C. brought an action of debt against Pierce, and pending the writ, Pierce being possessed of goods and chattles of the value of 300l. in secret made a general deed of gift of all his goods and chattels real and personal whatsoever to Twyne, in satisfaction of his debt; notwithstanding that Pierce continued in possession of the said goods, and some of them he sold; and he shored the sheep, and marked them with his own mark: and afterwards C. had judgment against Pierce, and had a *fieri facias* directed to the Sheriff of Southampton, who by force of the said writ came to make execution of the said goods; but divers persons, by the command of the said Twyne, did with force resist the said Sheriff, claiming them to be the goods of the said Twyne by force of the said gift; and openly declared by the commandment of Twyne, that it was a good gift, and made on a good and lawful consideration. And whether this gift on the whole matter, was fraudulent and of no effect by the said act of (a) 13 Eliz. or not, was the question. And it was resolved by Sir Thomas Egerton Lord Keeper of the Great Seal, and by the Chief Justice Popham and Anderson, and the whole court of Star-Chamber, that this gift was fraudulent, within the statute of 13 Eliz. And in this case divers points were resolved:

(a) 5 Co. 60. a.
b. 6 Co. 18. b.
10 Co. 56. b.
3 Inst. 152. Co.
Lit. 3. b. 76. a.
290. a. b. 13 El.
c. 5. 2 Leon. 8, 9,
47, 223, 308,
309. 3 Leon 57.
Litch 222.

2 Rol. Rep. 493. Palm. 415. Cr. El. 233, 234, 645, 810. Cro. Jac. 270, 271. Dy. 295. pl. 17, 351. pl. 23. 2 Bulst. 226. Raftal. Entries 207. b. Lane 47, 103. Hob. 72, 166. Moor 638. Doct. pla. 200. Yelv. 196, 197. 1 Brownl. 111. Co. Ent. 162. a.

cause

Because the gift is general, without exception of his (a) apparel, or anything of necessity; for it is commonly, said *quod* (b) *dolus versatur in generalibus*.

(a) Godb. 398.
(b) 2 Bulstr.
226. 2 Co. 34. a.
1 Rol. Rep. 157.
Moor 321.

2. The donor continued in possession, and used them as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them.

3. It was made in secret, *et dona clandestina sunt semper suspiciosa*.

4. It was made pending the writ.

5. Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and a trust is the cover of fraud.

6. The deed contains, that the gift was made honestly, truly, and *bona fide*; *et clausulæ inconsuetæ semper inducunt suspicionem*.

Secondly, it was resolved, that notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, yet it was not within the proviso of the said act of 13 Eliz. by which it is provided, that the said act shall not extend to any estate or interest in lands, &c. goods or chattels made on a good consideration and *bona fide*; for although it is on a true and good consideration, yet it is not *bona fide*, for no gift shall be deemed to be *bona fide* within the said proviso which is accompanied with any trust: as if a man be indebted to five several persons, in the several sums of 20l. and hath goods of the value of 20l. and makes a gift of all his goods to one of them in satisfaction of his debt, but there is a trust between them, that the donee shall deal (c) favourably with him in regard of his poor estate, either to permit the donor, or some other for him, or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able; this shall not be called *bona fide* within the said proviso; for the proviso saith on a good consideration, and *bona fide*; so a good consideration doth not suffice, if it be not also *bona fide*: and therefore, reader, when any gift shall be to you in satisfaction of a debt, by one who is indebted to others also; 1.

(c) Goldsb. 161.

Vide ante 36. a.
b.

Let it be made in a public manner, and before the neighbours, and not in private, for secrecy is a mark of fraud. 2. Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt. 3. Immediately after the gift, take the possession of them; for continuance of the possession in the donor, is a sign of trust. And know, reader, that the said words of the proviso, on a good consideration, and *bona fide*, do not extend to every gift made *bona fide*; and therefore there are two manners of gifts on a good consideration, *scil.* consideration of nature or blood, and a valuable consideration. As to the first in the case before put; if he who is indebted to five several persons, to each party in 20l. in consideration of natural affection, gives

Cr. Jac. 127.
Palm. 214.

all his goods to his son, or cousin, in that case, forasmuch as others should lose their debts, &c. which are things of value, the intent of the act was, that the consideration in such case should be valuable; for equity requires, that such gift, which defeats others, should be made on as high and good consideration as the things which are thereby defeated are; and it is to be presumed, that the father, if he had not been indebted to others, would not have dispossessed himself of all his goods, and subjected himself to his cradle; and therefore it shall be intended, that it was made to defeat his creditors: and if consideration of nature or blood should be a good consideration. within this proviso, the stat. would serve for little or nothing, and no creditor would be sure of his debt. And as to gifts made *bona fide*, it is to be known, that every gift made *bona fide*, either is on a trust between the parties, or without any trust; every gift made on a trust is out of this proviso; for that which is betwixt the donor and donee, called (a) a trust *per nomen speciosum*, is in truth, as to all the creditors, a fraud, for they are thereby defeated and defrauded of their true and due debts. And every trust is either expressed, or implied: an express trust is, when in the gift, or upon the gift, the trust by word or writing is expressed: a trust implied is, when a man makes a gift without any consideration or on a consideration of nature, or blood only: and therefore, if a man before the stat of 27 H. 8. had bargained his land for a valuable consideration to one and his heirs, by which he was seised to the use of the bargainee; and afterwards the bargainor, without a consideration infeoffed others, who had no notice of the said bargain; in this case the law implies a trust and confidence, and they shall be seised to the use of the bargainee: so in the same case, if the feoffees, in consideration of nature, or blood, had without a valuable consideration infeoffed their sons, or any of their blood who had no notice of the first bargain, yet that shall not toll the use raised on a valuable consideration; for a feoffm. made only on consideration of nature or blood, shall not toll an use raised on a valuable consideration. but shall toll an use raised on consideration of nature, for both consideration. are *in aequali jure*, and of one and the same nature.

(s) 6 Co. 72. b.

2 Roll. 779.

2 Roll. 779.

33 H. 6. 16.
7 Co. 39. b.

And when a man, being greatly indebted to sundry persons, makes a gift to his son, or any of his blood, without consideration, but only of nature, the law intends a trust betwixt them, *scil.* that the donee would, in consideration of such gift being voluntarily and freely made to him, and also in consideration of nature, relieve his father, or cousin and not see him want who had made such gift to him, *vide* 33 H. 6. 33. by Prisot, if the father infeoffs his son and heir apparent within age *bona fide*, yet the lord shall have the wardship of him: so note, valuable consideration is a good consideration within this proviso; and a gift made *bona fide*, is a gift made without any trust either expressed or implied:

by

by which it appears, that as a gift made on a good consideration, if it be not also *bona fide*, is not within the proviso; so a gift made *bona fide*, if it be not on a good consideration is not within the proviso; but it ought to be on a good consideration, and also *bona fide*.

To one who marvelled what should be the reason that acts and stat. are continually made at every parliament without intermission, and without end; a wise man made a good and short answer, both which are well composed in verse.

Quæritur, ut crescant tot magna volumina legis?

In promptu causa est, crescit in orbe dolus.

And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole court, that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud. Note, reader, according to their opinions, divers resolutions have been made.

Between Pauncefoot and Blunt, in the Excheq. Chamber, Mich. 35 & 36 El. the case was: Pauncefoot being indicted for recusancy, for not coming to divine service, and having an intent to flee beyond sea, and to defeat the Queen of all that might accrue to her for his recusancy or flight, made a gift of all his leases and goods of great value, coloured with feigned consideration and afterwards he fled beyond sea, and afterwards was outlawed on the same indictment: and whether this gift should be void to defeat the Queen of her forfeiture, either by the common law, or by any stat. was the question: and some conceived, that the common law, which (a) abhors all fraud, would make void this gift as to the Queen, *vide* Mich. 12 & 13 El. Dyer (b) 295. 4 & 5 P. & M. 160. And the stat. of (c) 50 E. 3. cap. 6. was considered; but that extends only in relief of creditors, and extends only to such debtors as flee to sanctuaries, or other privileged places: but some conceived, that the stat. of (d) 3 H. 7. cap. 4. extends to this case. For although the preamble speaks only of creditors; yet it is provided by the body of the act generally, that all gifts of goods and chattels made or to be made on trust to the use of the donor, shall be void and of no effect, but that is to be intended as to all strangers who are to have prejudice by such gift, but between the parties themselves it stands good: but it was resolved by all the Barons, that the stat. 13 Eliz. c. 5. (e) extends to it, for thereby it is enacted and declared, that all feoffm. gifts, grants, &c. "to delay, hinder or defraud creditors, and others, of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs," shall be void, &c. So that this act doth not extend only to creditors, but to all others who had cause of action, or suit, or any penalty, or forfeiture, &c.

Lane 44, 45.
Pauncefoot's
Case.

(a) Antea 78. a.
(b) Antea 78. a. b.
Dyer 295. pl. 8,
9, 10, &c. Lane
44.
(c) Co. Lit. 76. a.
(d) Cro. El. 291,
292. Lane 45.
(e) Co. Lit. 3. b.
76. a. 290. a. b.
3 Inst. 152. 5 Co.
60. a. b. 6 Co.
18. b. 10 Co.
56. b. Co. Ent.
162. a. 1 Leo 1.
47. 308, 309.
2 Leon. 8, 9, 223.
3 Leon. 57.
Litch 222.
2 Roll. Rep. 493.
Palm 415. Cr.
El. 233, 234,
645, 810. Cr.
Jac. 270 2 Bulst.
226. Hob. 72,
165. Yelv. 196,
197 1 Brownl.
11. Dyer 295.
pl. 17, 351. pl.
23. Rastal
Fraudulent
Deeds. 1 Rast.
Ent. 207. b.
Lane 47, 103.
Moor 638.
Doct. pl. 200.

And it was resolved, that this word (forfeiture) should not be intended only of a forfeiture of an obligation, recognizance, or such like (as it was objected by some, that it should, in respect that it comes after damage and penalty) but also to every thing which shall by law be forfeit. to the King or subj. And therof. if a man, to prevent a forf. for felony, or by outlaw. makes a gift of all his goods, and afterwards is attainted or outlawed, these goods are (a) forfeited notwithstanding this gift : the same law of recusants, and so the statute is expounded beneficially to suppress fraud. Note well this word (b) (declare) in the act of 13 Eliz. by which the Parliament expounded, that this was the (c) common law before. And according to this resolution it was decreed, Hil. 36 Eliz. in the Exchequer Chamber.

(a) Co. Lit.
290. b.

(b) Co. Lit.
76. a. 290. b.

(c) Hard. 397.

Standen and
Bullock's Case.

(d) Moor 605,
615. Bridgm. 23.
5 Co. 60. b.
Palm. 217. Lane
22. 2 Jones 95.

Mich. 42 & 43 Eliz. in the Com. Pleas, on evidence to a jury, between Standen (d) and Bullock, these points were resolved by the whole court on the stat. of 27 El. c. 4. Walmsley J. said, that Sir Christ. Wray, late C. J. of England, reported to him, that he, and all his comp. of the K.'s B. were resolved, and so directed a jury on evidence before them ; that where a man had conveyed his land to the use of himself for life, and afterw. to the use of divers others of his blood, with a future power of revocation, as after such feast, or after the death of such one ; and afterwards, and before the power of revocation began, he, for valuable considerat. bargained and sold the land to another and his heirs ; this bargain and sale is within the (e) remedy of the said stat. For although the stat. saith, " the said first conveyance not by him revoked, according to the " power by him reserved," which seems by the literal sense to be intended of a present power of revocation, for no revocation can be made by force of a future power until it comes *in esse* : yet it was held that the intent of the act was, that such voluntary conveyance which was originally subject to a power of revocation, be it *in presenti*, or *in futuro*, should not stand against a purchase for *bona fide* for a valuable consideration ; and if other construction should be made, the said act would serve for little or no purpose, and it would be no difficult matter to evade it : so if A. had reserved to himself a power of revocation with the assent of B. and afterwards A. bargained and sold the land to another, this bargain and sale is good, and within the remedy of the said act ; for otherwise the good provision of the act, by a small addition, and evil invention, would be defeated.

(e) 1 Sid. 133.

And on the same reason it was adjudged, 38 Eliz. in the Common Pleas, between Lee and his wife executrix of one Smith plaintiff and Mary (f) Colshil, executrix of Tho. Colshil, defendant in debt on an obligation of 1000 marks, Rot. 1707. the case was, Colshil the testator had the office of the Queen's Customer, by letters patent, to him and his deputies ; and by indenture between him and Smith, the testator of the plaintiff and for 600l. paid, and 100l. *per ann.*

Colshil's Case.

(f) 4 And. 55,
107, Godb. 213.
Cro. El. 529.
Moor 857. Ley
2, 75, 79.

to be paid during the life of Colshil, made a deputation of the said office to Smith; and Colshil covenanted with Smith, that if Colshil should die before him, that then his executors should repay him 300 l. And divers covenants were in the said indenture concerning the said office, and the enjoying of it: and Colshil was bound to the said Smith in the said obligation to perform the covenants; and the breach was alledged in the non-payment of the said 300 l. forasmuch as Smith survived Colshil: and although the said covenant to repay the 300 l. was lawful, yet forasmuch as the rest of the covenants were against the statute of (a) 5 E. 6. cap. 16. and if the addition of a lawful covenant should make the obligation of force as to that, (b) the statute would serve for little or no purpose; for this cause it was adjudged, that the obligation was utterly void.

2. It was resolved, that if a man hath power of revocation and afterwards, to the intent to defraud a purchaser, he levies a (c) fine, or makes a feoffment, or other conveyance to a stranger, by which he extinguishes his power, and afterwards bargains and sells the land to another for a valuable consideration, the bargainee shall enjoy the land, for as to him, the fine, feoffment, or other conveyances by which the condition was extinct, was void by the said act; and so the first clause, by which all fraudulent and covenous conveyances are made void as to purchasers, extend to the last clause of the act, *scil.* when he who makes the bargain and sale had power of revocation. And it was said, that the statute of 27 El. hath made voluntary estates made with power of revocation as to purchas. in equal degree with conveyances made by fraud and covin to defraud purchasers.

Between (d) Upton and Bassett in trespass, Trin. 37 El. in the Common Pleas, it was adjudged, that if a man makes a lease for years, by fraud and covin, and afterwards makes another lease *bona fide*, but without fine or rent reserved, that the second lessee should not avoid the first lease.

For first it was agreed, that by the common law an estate made by fraud should be avoided only by him who had a former right, title, interest, debt or demand, as 33 H. 6. a sale in open (e) market by covin shall not bar a right which is more ancient: nor a covenous gift shall not defeat execution in respect of a former debt, as it is agreed in 22 Aff. 72. but he who hath right, title, interest, debt or demand, more puisne shall not avoid a gift or estate precedent by fraud by the common law.

2. It was resolved, that no purchaser should avoid a precedent conveyance made by fraud and covin, but he who is a (f) purchaser for money or other valuable consideration, for although in the preamble it is said (for money or other good consideration) and likewise in the body of the act (for money or other good consideration) yet these words (good consideration) are to be intended only of valuable consideration and that appears by the clause which concerns those who had power of revocation for there it is said, for money or other good consideration paid, or given, and this word (paid) is to be referred to (money) and (given) is to be referred to (good consideration) so the sense is for money paid, or other good consideration given, which words exclude

(a) Style 29.
Cro. El. 520.
Cro. Jac. 269.
Hob. 75. Co. Lit.
234. a. 12. Co. 78.
3 Inst. 148, 154.
3 Keb. 26, 659.
660, 717, 718.
1 Brownl. 70, 71.
2 And. 55, 107.
3 Bulst. 91.
3 Leon. 33.
1 Rol. Rep. 157,
236. Goldsb.
180.
(b) 2 And. 56,
57, 108. 1 Mod.
Rep. 35, 36.
Hob. 14. 11 Co.
27. b. 2 Rolle's
28. Co. Lit.
224. a. 2 Jones
90, 91. Cro. El.
529, 530. Cro.
Car. 338. Godb.
212, 213.
1 Brownl. 64.
Plowd. 68. b.
Moor 856, 857.
Ley 75, 79.
(c) 1 Co. 112. b.
174. a. Co. Lit. j
237. a. Hob. 337,
338. Moor 605.
2 Rol. Rep. 337.
496. Winch 65.
(d) Co. Ent.
676. b. nu. 19.
Cro. El. 444,
445. Lane 45.
Upton and
Bassett's Case:
(e) Antea 78. b.
Plow. 46. b. 55.
a. Fitz. Replic.
15. Br. Tres-
pass 26. Br.
Collusion 4.
Br. Property 6.
2 Inst. 713.
14 H. 8. 8. b.
33 H. 6. 5. a. b.
(f) Cio. El.
445.

all considerations of nature or blood, or the like and are to be intended only of valuable considerations which may be given ; and therefore he who makes a purchase of land for a valuable consideration, is only a purchaser within this statute. And this latter clause doth well expound these words (other good consideration) mentioned before in the preamble and body of the act.

2 And. 233.
Nedham and
Beaumont's
Case,

And so it was resolved, *Pasch.* 32 El. in a case referred out of the Chancery to the consideration of Windham and Periam, Justices : between John Nedham plaintiff, and Beaumont Serjeant at law, defendant ; where the case was, Hen. Babington seised in fee of the manor of Lit-Church in the county of Derby, by indent. 10 Feb. 8 El. covenanted with the Lord Darcy, for the advancement of such heirs males, as well those he had begot, as those he should afterwards beget on the body of Mary then his wife (sister to the said Lord Darcy) before the feast of St. John Baptist then next following, to levy a fine of the said manor to the use of the said Hen. for his life, and afterwards to the use of the eldest issue male of the bodies of the said Hen. and Mary begot. in tail, &c. and so to three issues of their bodies, &c. with the remainder to his right heirs. And afterw. 8 *Maii. ann.* 8 El. Hen. Babington, by fraud and covin, to defeat the said covenant, made a lease of the said manor for a great number of years, to Rob Heys ; and afterwards levied the fine accordingly : and on conference had with the other Justices, it was resolved, that although the issue was a purchaser, yet he was not a purchaser in vulgar and common intendment : also considerat. of blood, natural affection is a good considerat. but not such a good considerat. which is intended by the stat. of 27 El. for (a) a valuable considerat. is only a good considerat. within that act : in this case Anderson C. J. of the Com. Pleas, said, that a man who was of small understanding, and not able to (b) govern the lands which descended to him, and being given to riot and disorder, by mediation of his friends, openly conveyed his lands to them, on trust and confidence that he should take the profits for his maintenance, and that he should not have power to waste and consume the same ; and afterwards, he being seduced by deceitful and covinous persons, for a small sum of money bargained and sold his land, being of a great value : this bargain, altho' it was for money, was holden to be (c) out of this stat. for this act is made against all fraud and deceit, and doth not help any purchaser, who doth not come to the land for a good considerat. lawfully and without fraud or deceit ; and such conveyance made on trust is void as to him who purchases the land for a valuable consideration *bona fide*, without deceit or cunning.

(a) 2 Roll. Rep.
305, 306.

(b) Cro. El. 445.

(c) Cro. El. 445.

And by the judgment of the whole court Twyne was convicted of fraud, and he and all the others of a riot.

[See 2 Black. Com. ch. 20. fol. 296, 297.]

The

The Case of F I N E S.

See Fermor's
Case ante 77.
and Sir George
Brown's 50, 51.

The Resolution of the Justices, after
hearing many Arguments of Counsel
learned on both Sides, and divers
Conferences amongst themselves upon
the Statutes of Fines. *Pasch. 44 Eliz.*

A tenant for life of certain land, the remainder to B. in tail, the reversion to B. and his heirs expectant; B. levies a fine to C. and D. and to the heirs of C. to the use of them and their heirs, and hath issue, and dies before all the proclamations are past, the issue in tail then being beyond the seas; the proclamations are made, and afterwards the issue in tail returns, and immediately makes claim on the land to the remainder in tail; and if, in this case, the estate-tail was barred, or not, was the question; and in this case four points were resolved.

1. That the estate which passes by the fine, as to the estate-tail, was not determined by the death of B. for it was said, if one be tenant in tail of a (a) rent, (b) advowson, tithes, common, or other such things which lie in grant, and by deed grants them in fee, and dies, the grant is not absolutely determined by his death, but it is at the election of the issue in tail to make it voidable, or void at his pleasure. For if he brings a formedon for the rent, &c. he makes the grant voidable; but if he distrains for the rent, or claims it on the land, he thereby determines his election to make it void; & sic de cæteris. But until he makes his election, the grant is not determined, for then it would prevent his election; and true it is, as

L 4

Littleton

Moor 628.
Jenk. Cent. 274.
2 And. 177.
Rep. Q. A. 20.
Carth. 260.

(a) Bridg. 97.
(b) Leon. 111.
3 Leon. 212.
Bridgm. 96.
Lit. sect. 618.
Co. Lit. 331. b.

(a) Lit. sect.
598, 600, 606,
607, 603, 613.

(b) Lit. sect.
617. Co. Lit.
332. a.

(c) Plowd.
Com. 556. a.
Hob. 338.

(d) Plowd.
556. a. Co. Lit.
331. a. 345. b.
(e) Lit. 146.
a. b. Lit. sect.
650. Cro. Car.
429.
Carth. 260.

(f) 10 Co. 98. a.

(g) 2 Co. 52. a.
Hob. 338, 339.
Lit. sect. 649.
Lit. 146. a.

(h) 10 Co. 96. a.
98. a. Plowd.
557. b.
(i) 10 Co. 96. a.
1 Sand. 261.
Fitz. Dower 98.
Cart. 210.

Littleton (a) saith, that of such things which pass from tenant in tail by way of grant, or by confirmation, or by release, nothing can pass to make an estate to him to whom such grant, confirmation or release is made, but that which the tenant in tail may lawfully make, and that is but for the term of his life. And if tenant in tail be of an (b) advowson, &c. and he by deed makes a grant of the advowson to another in fee, it is no discontinuance; for in such cases the grantees have but an estate for the life of ten. in tail, and that (as it was said) is as much as to say, the grant is no discontinuance, but is determinable by the issue, after the death of the ten. in tail, at his election, either by claim or by action. And Littleton is not to be understood literally, viz. that the grantee, in such case, hath only an estate for the (c) life of tenant in tail, for then the ten. in tail in such case would have the reversion in tail, and should have an action of waste, or enter for the forfeiture on alienation made by such grantee: or if ten. in tail of a reversion expectant on an estate for years, or life, grants it in fee, and the lessee attorns, and afterw. the particular estate determines, and the grantee commits waste, or makes a feoffment, &c. that the ten. in tail shall punish the (d) waste, or enter for the forfeiture; for Littleton himself, 145 is against that, for he saith, if (e) ten. in tail grants all his estate over to another, in this case the grantee hath an estate but for the life of ten. in tail, and the reversion of the tail is not in the ten. in tail, because he hath granted all his estate and his right, &c. And if the grantee commits waste, the ten. in tail shall never have an action of (f) waste, because no reversion is in him, but the reversion and inheritance of the tail, during the life of the ten. in tail, is in (g) abeyance.

Note, reader, the office of an interpreter is to make such construction, not only that one and the same author be not against himself, but also that the resolutions or judgments reported in one book, be not by any literal interpretation expounded against any resolution or judgment reported in any other, but that all (*si fieri possit*) may stand together. So here the intent of Littleton was not that the grantee had but an estate for life, and that his estate should be absolutely determined by the death of the tenant in tail, but that it was not a discontinuance, nor had the grantee any durable or fixed estate but for the life of the tenant in tail, but that the issue after his death might at his pleasure determine it: and if the grantee in such case shall have but an estate for life of tenant in tail, then the wife of such grantee shall not be (h) endowed, against which it is adjudged in (i) 24 E. 3. 28. b. Also if the estate of the grantee should be absolutely in judgment of law determined by the death of ten. in tail, then the issue in tail, after the death of the father, could not have a formedon against such grantee; for although

although the demandant and the tenant would admit the estate which passed by the grant to continue, yet the court, who ought to judge according to law, and is not concluded by the admittance of the parties, of any thing which judicially appears to the contrary, ought *ex officio* in such case to abate the writ. But it is agreed in 13 H. 7. 10. pl. 8. by all the justices, if tenant in tail of (a) rent grants it with warranty, it is no discontinuance, although assets descend, but he may distrain; but if he brings a (b) *formedon* in the descender, he shall be barred, 33 E. 3. *formedon* 47. acc. By which it appears, that in such case the grant of tenant in tail is determinable by his death, by claim on the land, or by action: so when tenant in tail grants a rent, reversion, common, &c. in fee, he hath an indefeasible estate during the life of tenant in tail, (and that Littleton intends) and after the death of tenant in tail, it is defeasible at his election; for if he comes on the land and distrains, or by claim on the land determines his election, then on the matter it is void by the death of tenant in tail; for otherwise the warranty in such case would make a discontinuance; as if tenant in tail be (c) disseised, and releases to the disseisor with warranty, and dies, it is a discontinuance, because the estate, on which the warranty enures, continues after the death of tenant in tail: but when tenant in tail of a rent, reversion, &c. grants it in fee with warranty, and dies, now if the issue in tail determines his election to have it void, it is absolutely determined by his death, and by consequence the warranty also: but if the issue brings a *formedon* and determines his election to make the estate to have continuance, and not to be determined by the death of the tenant in tail, then the estate doth continue, and by consequence the warranty doth remain, and if assets descend, the issue shall be barred; *vide* 19 E. 3. Brief 468. 24 E. 3. 28. 36 Aff. 8. 22 R. 2. Discontinuance 50. 8 H. 4. 9. 33 E. 3. *Formedon* 47. 48 E. 3. 23. 32 E. 3. Discontinuance 2. 23 Aff. 8. 16 H. 7. 4. a. 21 H. 7. 40. a. 38 H. 8. Br. Discontinuance 35. for this matter: and there is no difference between a grant of tenant in tail of a rent, advowson, common, tithes, &c. in possession, and a grant of tenant in tail, of a reversion or remainder expectant on an estate for life: for although in the first case, the issue may have his *formedon* presently by the death of the tenant in tail, and in the other case not till after the death of the tenant for life; yet it is all one: for by the death of the ten. in tail the grant is not determined till election made by the issue in tail; for after the death of tenant for life he may bring a *formedon* if he will.

Note, reader, if you be desirous to know the reason, why on the

(a) 36 Aff. 8. Kelw. 79. Co. Lit. 332. b. 327. b. 57. b. 4 H. 7. 17. b. 21 H. 7. 40. a. 3 H. 7. 12. b. 13. a. 9 E. 4. 18. b. 22 E. 4. 4. b. 5 E. 4. 92. b. 3 E. 4. 6. (b) 16 H. 7. 4. a. 21 H. 7. 40. a. Carth. 260. 9 Co. 51.

(c) Lit. sect. 618, 601. a. Co. Lit. 328. a. b. Postea 85. b.

Co. Lit. 322. b.

• Lucas 360.

(a) Co. Lit.
327. b.

(b) Hob. 45.
Co. Lit. 332. a.
Lit. sect. 618.

(c) Antea 83. a.
Lit. sect. 601.
Co. Lit. 328,
a. b.

(d) Co. Lit.
333. b.

(e) Antea 78. a.

(f) Co. Lit.
327. b.

(g) Co. Lit.
327. b.

(h) Co. Lit.
327. b.

the words of the act of West. 2. cap. 1. *de donis * conditionalibus*, that is to say, (*Non habeant illi, quibus tenementum sic fuerit datum sub conditione, potestatem alienandi tenementum sic datum, quo minus ad exitum illorum, quibus tenementum sic fuerit datum, remaneat post illorum obitum, vel ad donatorem, &c. revertatur.*) These sundry constructions have been made: viz. if tenant in tail makes a (a) feoffment in fee, it is a discontinuance, and avoidable by action only: if tenant in tail of a rent, or other (b) thing which lies in grant, grants it in fee, it is no discontinuance, but is voidable by claim or by action: if tenant in tail of land grants a rent out of it, the rent is absolutely determined by his death: if tenant in tail be (c) disseised, and releases to his disseisor, it is no discontinuance, but the estate is avoidable by entry or action of the issue of the tenant in tail: but if the release be with warranty it is a discontinuance, if the issue in tail be heir to the warranty: but if tenant in tail makes a lease for the term of his own life, or for years, and releases to the lessee and his heirs, it is no (d) discontinuance, although it be with warranty: so if tenant in tail makes a lease for life, and afterwards grants the reversion in fee, it is no discontinuance of the fee, unless it be executed in the life of the grantor. And all these (and many other) different constructions have been made on the words aforesaid, *scil. non habeant illi, quibus tenementum sic fuerit datum sub conditione, potestatem alienandi, &c.* this is the reason which is worthy of observation; for the Judges have construed the said words according to the rule and reason of the (e) common law (which always is *optimus interpretandi modus*;) for at the common law, if a Bishop, Abbot, &c. or husband seised in the right of his wife, make a feoffment in fee, it is by the common law a discontinuance, and doth put the successor, or the wife, to her action, for the favour which the law gives to an estate which passes by livery and seisin, because it is public and notorious, and in ancient times was the common and usual assurance of the land: but if a (f) Bishop, &c. or husband seised of a rent, or any thing which lies in grant, by deed grants it in fee, it is no discontinuance, and yet it is not absolutely determined by the death of the Bishop, &c. or husband, for the successor, or the wife, hath (g) election to determine it and make it void, or by bringing of his writ to make it voidable, or by claim on the land to make it void: but if a (h) Bishop, &c. or husband grants a rent in fee out of the wife's land, or bishoprick, it is absolutely void by the death of the Bishop, &c. or of the husband: also if a Bishop, or the husband and wife be disseised, and the Bishop, or husband, releases to the disseisor, it is no discontinuance; if the Bishop, or husband makes a lease for years, and releases to the lessee, and his heirs, it is not absolutely determined

determined by the death of the Bishop, or husband; but it is void or voidable at the election of the successor, or of the wife. But if a Bishop, or the husband, makes a lease for life, and afterwards grants the reversion in fee, and the lessee for life dies in the life of the Bishop or of the husband, it is a discontinuance; otherwise if the lessee survives the Bishop, or the husband; *vir bonus est quis? Qui consulta patrūm, qui leges, juraque servat.*

And it was held by Popham, C. J. and divers others of the Justices, that the stat. of 32 H. 8. cap. 36. hath (a) enforced the case; that the estate which passes by the fine shall not be determined by the death of the tenant in tail, for inasmuch as the statute hath provided, that fines levied of any land, tenement, or hereditament entailed, &c. in possession, reversion, or remainder, immediately after the fine engrossed, and proclamations past, shall be a bar, &c. if the fine with proclamation cannot bar the estate-tail, unless the estate given by the fine continues, the same statute which provides, that the fine with proclamations shall be a bar, provides also for all things which are necessary and incident to the perfection and consummation thereof: and therefore in 28 El. in a *quid juris clamat* brought by Francis (b) Windham, then one of the Justices of the Common Pleas, against the lady Gresham, in the Common Pleas; the case was thus in effect; that the lady Gresham was tenant for life of the manor of West Bradenham in Norfolk, the remainder to Richard Read in tail, the reversion to Will. Read in fee. Rich. Read levied a fine of his remainder to Just. Windham, and his heirs, and before the engrossing thereof (as *oportet*) Just. Windham brought a *quid juris clamat* against the lady Gresham, who pleaded, that Richard Read the consor, at the time of the fine levied, had but an estate in tail in remainder; and shewed how, and demanded judgment if she should be compelled to attorn; upon which the plaintiff demurred. And although before the statutes of fines of (c) 4 H. 7. & 32 H. 8. it was a (d) good plea, as appears 37 H. 6. 33. b. 2 E. 2. Age 77. 2 E. 3. 23. & 22 E. 3. 18. yet it was adjudged, that now after the said statutes which make the fine (after the engrossing and proclamations past) a bar of the estate-tail; although the *quid juris clamat* ought to be brought (e) before the engrossing, and by consequence, before the estate-tail be barred; and that *non constat* at the time of the *quid juris clamat* brought, that it shall be a fine at the common law, or a fine levied with proclamations: yet it was adjudged that she should (f) attorn.

See, reader, 17 E. 3. 7. pl. 20. If an alienation be made in (g) mortmain; and 31 E. 3. Ancient Demesne 16. If a fine be levied of a reversion of land in (h) ancient demesne, 36 H. 6. 24. pl. 19.

(a) Co. Lit.
318. a.

Justice Windham's Case.
28 Reg. Eliz.
(b) Gould 4.
Popham 63.
2 Anderf. 112.
Co. Lit. 318. a.
356. a.

(c) 4 H. 7. c. 24.
32 H. 8. c. 36.
(d) 1 Rol. 297.
Raymond 347.

(e) 5 Co. 39. a. b.
Plowd. 431. b.
6 Co. 68. a.

(f) Co. Lit.
318. a.
(g) Co. Lit.
318. a. 1 Rol.
297.
(h) Co. Lit.
318. a.

The Case of FINES. Part III.

(a) Co. Lit.
318. a.
(b) Co. Lit.
318. a.

pl. 19. If an (a) infant levies a fine, 45 E. 3. 6. if a fine be levied of a reversion of land held in (b) *capite* without licence; or, as in our case, if tenant in tail of a reversion or remainder, levies a fine thereof, in all these cases, and other like, the tenant was not compellable to attorn, because the estate which passed by the fine was not lawful, but either prohibited by the common law, or by some statute, and for the greater part was voidable: but now the statutes have made a fine levied by tenant in tail to be lawful, and after the engrossing thereof, and proclamations past, hath made the estate, which passes by the fine, unavoidable: and in the said case two points were resolved for good law.

1. That every fine levied should be intended to be levied with proclamations according to the said statutes, for it is most beneficial for the conusee; and all fines being the general assurance of the land, are levied accordingly.

2. That the statutes which make the fine, after the engrossing thereof, and proclamations past, a bar to the estate-tail, gives all things incident thereto; and in as much as the conusee cannot have a *quid juris clamat* after the engrossing, from thence it follows that he shall have it before: and now the statutes have altered the reason of the common law, and given greater force and strength to a fine than it had before. For the reason of the common law was, that the particular tenant should never be compelled to attorn to an unlawful, tortious, or voidable grant: which judgment, in the case of Justice Windham, was affirmed for good law by all the Judges in this case. So it was resolved by all the Judges of England, and Barons of the Exchequer, for the one cause or for the other, that the estate which passed by the fine, as to the estate-tail, was not absolutely determined by the death of the tenant in tail.

Co. Lit. 356. a.
C. El. 603.
5 Co. 39.
F. N. B. 147.

Popham 66.
Dall. 51. Dall.
in Kelw. 205. b.
Dall. in Ash.
pl. 8. Mo. 629.
Dy. 254. pl. 104.
Postea 91. a.

2. It was resolved by all the Justices and Barons of the Exchequer *nullo contradicente*, that although by the death of tenant in tail, a right of estate-tail did descend to the issue, in as much as he died before all the proclamations were past; yet when the proclamat. pass without any claim made by the issue in tail on the land, this right which descended to him is barred by the stat. of 4 H. 7. & 32 H. 8. for altho' the fine without the proclamations, nor the proclamations without the fine can bar an estate-tail; and altho' that after the fine levied, and before all the proclamations be past, a right is descended to the issue in tail *per formam doni*, which is paramount the fine, and there is no fine with proclamations levied after the death of tenant in tail,

tail, to bar this right so descended to the issue in tail; yet forasmuch as it is provided by the statute of 32 H. 8. "That all fines levied with proclamations of any lands, tenements, or hereditaments intailed to the person so levying the same, or to any of his ancestors in possession, reversion, remainder, or in use, shall be immediately after the fine levied, ingrossed, and proclamations made, adjudged a sufficient bar against the said persons and their heirs, claiming the same only by force of any such entail:" and the issue in tail, in this case, claims as heir by force of the said estate-tail; therefore by the express letter of the said act he is barred: with this agrees the judgment in Smith and Stapleton's case, Plow. Com. 430.

3. It was resolved by Popham and Anderson Ch. Justices, and all the other Justices and Barons of the Exchequer but three, that in this case the issue in tail being heir and privy, could not by any claim that he could make save the right of the (a) estate-tail which descended to him; but that after the proclamations are past, the estate-tail should be barred by the statutes of 4 H. 7. & 32 H. 8. notwithstanding any claim that could be made by him: for it is enacted by the statutes of 4 H. 7. "That every fine after the engrossing of it, and proclamations had and made, shall be a final end, and conclude as well privies as strangers:" and if no saving or exception had been after in the act, the right of all, as well strangers as privies, had been bound and barred by this act. And therewith agrees the opinion of five Justices, (b) 19 H. 8. 2. *scil.* Fitz-James, Brudnel, Fitzherbert, Brook, and Moor. Then if all the exceptions and savings in the act do extend to strangers to the fine, and not to parties or privies, from thence it will follow, that the heir, or other privy, cannot by any claim avoid the fine of his ancestor. The first exception as to feme coverts, &c. doth not extend to this case: the second saving by express words extends only to strangers: the third saving extends also to strangers who are not parties or privies to the fine; for the words are, "and also saving to all other persons all such action, right, &c. as first shall grow, remain, descend, or come after the said fine ingrossed, &c. by force of any gift in tail, &c." so that it appears by these words, (saving to all other persons, &c.) that he, who shall take benefit of this saving, ought to be "another person," and not party or privy to the fine: and therewith agrees the opinion of the said five Justices in (c) 19 H. 8. But if tenant in tail makes a feoffment, and the feoffee levies a fine with

(a) 1 Co. 96. b.
2 Rol. Rep. 342.

(b) 19 H. 6. b.
Br. Fine levy,
&c. 1. Br. Tail 2.
Dyer 3. pl. 3.
Mo. 251. 9 Co.
105. a.

(c) 19 H. 6. b.
Moor 301.

(a) pro-

(a) Moor 431.

Plowd. 374.

(b) Godb. 302.

Cr. El. 896.

Jenk. Cent. 254.

1 Brownl. 230.

(a) proclamations, the issue in tail after the death of his father, as it is there held, shall have five years within this third saving, for he is the first to whom the right doth accrue and descend after the fine levied. But if tenant in tail be (b) disseised, and the disseisor levies a fine with proclamations, and five years pass, and afterwards tenant in tail dies, there the issue in tail is barred, as it is there also held: for there, after the fine levied, the tenant in tail himself had right, so that the issue in tail was not the first to whom the right did accrue and descend after the fine levied, but after the feoffment in fee he himself had not any right: and with this diversity agrees the opinion in Stowel's case in Plowden's Commentaries; but in none of those cases the issue was privy, but a stranger to him who levied the fine. Also the stat. of 32 H. 8. which is but an explanation and interpretation of the act of 4 H. 7. (as appears by the preamble thereof) expounds the said act in such manner, that is to say, "That all fines levied with proclamations according to the stat. of 4 H. 7. of any lands, &c. in any wise entailed to the person so levying the same fine, or to any of his ancestors, shall be immediately after the same fine levied, ingrossed, and proclamation made, adjudged a sufficient bar, &c. And in all this act there is no saving for the issue in tail. *Ergo*, after the proclamations past, by the express provision of this stat. the issue in tail is barred, and no power is left to him to make claim, for the intent of the act was (as appears by the preamble) to to bar him by the fine; and therefore it was never intended to save his right: but against this it was objected, that altho' the letter of the said acts, and chiefly of the act of 32 H. 8. were against the issue in tail in this case, yet he might make his claim by the equity and intent and meaning of the said acts; for otherwise to what purpose should the proclamations be made, unless those who had lawful action, entry, or claim, might pursue it; for proclamations are made to this end and purpose, and the making of them with such solemnity as they are made would be utterly vain, if the issue in tail after the death of his father might not pursue his action, entry, or claim before all the proclamations incur; for the act of 32 H. 8. doth not bar any stranger, but him who levies the fine, and the issue of his body. And therefore if the issue after the death of his father cannot pursue his action, entry or claim, before the proclamations incur, the proclamations on such fine will be utterly idle and vain.

To which it was answered, that the act of 32 H. 8. being an act which explains and expounds the act of 4 H. 7. as to the fine by the tenant in tail, should not be taken by any strained

strained construction against the letter, for then it would be requisite to have another new act to make an explanation and exposition on the explanation and exposition which was made by the former act, and so *in infinitum*.

2. It appears by the stat. of 4 H. 7. the last clause, that every person hath liberty to pursue a fine according to the said act, *scil.* with proclamations in four several terms after the fine engrossed, or without proclamations, for so was the use (a) before the said act; and therefore the act of (b) 32 H. 8. which explains the said act of 4 H. 7. of necessity doth prescribe that proclamations shall be made according to the act of 4 H. 7. to distinguish it from a fine at the common law, which was not a bar to the estate in tail, and not to enable the issue to make a claim. For, as it hath been said, it would be against the intention of the act expressed in the preamble, and against the express purview of the body of the act; so that it was material that the fine should be levied with proclamations, otherwise it would not be levied according to the statute of 4 H. 7. which was interpreted and expounded by the said act of 32 H. 8.

3. It would be greatly inconvenient, that when tenant in tail levies a fine of a reversion or remainder, &c. expectant on an estate for life, or on a bargain and sale on a valuable consideration, or for the advancement of his children, or for the payment of his debts, &c. and dies before proclamations passed, that all this should be avoided by the claim of the heir in tail, when the donee could not have better assurance, either by common recovery (in as much as he was not tenant to the *præcipe*) or otherwise.

4. It is proved by divers judgments and resolutions given before this time, that the issue in tail in such case shall not make claim to save the estate-tail, but that after proclamations had it shall be barred, *Pasch.* 28 *Eliz. Rot.* 13. Edward, Lord (c) Zouch brought a *formedon* in the *descender* of the moiety of a manor, &c. against Bampffield, who pleaded in bar, that John, great grandfather of the demandant, levied a fine *sur consens de droit come ceo*, &c. with proclamations of the said moiety, *Pasch.* 30. H. 8. which was by the same fine granted and rendered to the said John and his heirs, whose estate the tenant had: the demandant replied, and said, that at the time of the fine levied, and at all times after (and shewed how) the said Richard Bampffield now tenant, was seised of the land in demand in his demesne as of fee: and on solemn argument it was agreed by Anderson, Periam, Windham, and Rhodes Justices, that the demandant being heir in tail against such fine levied by his ancestor, whose heir he is, was estopped to aver his seisin and continuance thereof in a stranger at the time of the said fine levied; nor to aver, *quod partes finis nihil habuer'*: and in the same case the Justices did consider,

(a) Co. Lit.
262. a.
Post. fo. 90. b.
(b) 10 Co. 50. a.
1 Leon. 224.
2 Leon. 62, 224.
3 Leon. 10.
Moor 115, 146.
1 And. 46.
Sav. 85, 88.
Co. Lit. 262. a.
372. a. 1 Bulst.
33. Goldsb. 11.
3 Co. 51. a.
Hob. 258.
7 Co. 32. a. b.
9 Co. 140. b.
11 Co. 75. a.

(c) Moor 250.
1 And. 165.
1 Leon. 75.
1 Jones 33. 35.
Goldsb. 107.
Winch. 43.
Hob. 333.
Sav. 84.
2 Leon. 36.
3 Leon. 211.
Lane 103.
Noy 59.
Cr. 11. 610.

if

if before the statutes of 4. H. 7. & 32 H. 8. such averments were allowable in law. And it seems by the better opinion of the books, that before the stat. of 4 H. 7. & 32 H. 8. that the issue in tail was not admitted to such averments against a fine levied by his ancestor. And this appears by the stat. of (a) 27 E. 1. cap. 1. *de finibus levatis*, which recites, *quod per aliquod tempus præteritum, &c. partes finium, & earum partium hæredes, (contra leges & consuetudines regni nostri antiquius usitat)* super hujusmodi finibus adnullandis & evacuandis, admittebantur proponere quod ante finem levatum & tempore levationis ejusdem, & postea petentes seu querentes, aut eorum antecessores de tenementis in finibus contenti, aut de aliqua parte earundem semper fuer' seisciti, & sic fines hujusmodi rite levatos per jurat' patriæ falsè, subornatè, & maliciôsè procurat' multotiens evacuabant & adnihilabant, & hæc minus justè: statuimus quod diētæ exceptiones, seu responsiones, vel inquisitiones patriæ super hujusmodi exceptionibus seu responsionibus, nullo modo contra hujusmodi recognitiones & fines de cætero admittantur. But against this, three exceptions were made.

1. That it is provided by the stat. *de donis conditionalibus*, quod (as to the issue in tail) *finis ipso jure sit nullus*.

2. That the said act of 27 E. 1. doth not extend to heirs in tail, but only to heirs in fee simple, as *dicitur arguendo* in 8 H. 4. 7. for the issues in tail are not bound by fines, or any other record which enures by way of estoppel or conclusion.

3. The said act of 27 E. 1. speaks *de finibus ritè levatis*, and a fine is not said *ritè levatus*, when there wants seisin in the one part or the other, so that *partes finis nihil habuerunt*; and so hath the said act by the Judges in ancient times been interpreted, as appears by the book in 46 E. 3. 14. (b) pl. 20. where in a (c) *formedon* in the *descender* the tenant pleaded a fine with warranty in bar, the demandant replied, *quod partes finis nihil habuerunt*. And (d) 13 Aff. 8. it is said, that it hath been adjudged a good plea for the issue in tail against a fine on grant and render of his father, to alledge the continuance in his father, and that he died seised, and that he entered as son and heir. And Br. tit. Fines 109. a (e) fine levied with proclamation by tenant in tail may be avoided by the issue, *si partes finis nihil habuerunt*, for the statute is intended *de finibus ritè levatis*; and therefore the issue in tail may plead *quod partes finis nihil habuerunt*, for then it is but a fine by conclusion between the partes: and in (f) 13 E. 3. Replicat. 62. and 17 E. 3. 53. some held that a fine is not *ritè levatus*, when *partes finis nihil habuerunt*, for seisin in one of the parties is of the essence of a fine rightfully levied.

As

(a) 2 Inst. 521,
522, &c.

(b) 2 Inst. 517.
1 Jones 458.

(c) 1 Leon 78.
Postea 89. a.

(d) Br. Fines
levics 74.
Postea 89. b.

(e) Sav. 88.
Postea 91. b.

(f) Postea 89. b.

As to the first objection, it was answered that the statute *de donis conditionalibus* was made, 13 E. 1. and the stat. *de finibus* was made 27 E. 1. in which the issue in tail is not excepted. *Ergo*, he shall be bound by the latter act, and therewith agrees a good opinion in 8 H. 4. 3, 8.

As to (a) the second object. although the issue in tail was not barred by any fine by his ancestor before the stat. of 4 H. 7. yet, as it hath been said, he was ousted to aver in such case, *quod partes finis nihil habuerunt*, and being privy and heir to him who levied the fine, was by the stat. of 27 E. 1. estopped and concluded to annihilate the fine of his ancestor by such plea; and although it is provided by the stat. *de donis conditionalibus*, *quod finis ipso jure sit nullus*, that is to say, to bar the right of the issue in tail, yet it is an estoppel to him to say, *quod partes finis nihil habuerunt*. And therefore the case is remarkable in 33 E. 3. Fitz. Estop 280. (b) where the case in effect was; grandfather, father, and son, the son brought a formedon of a gift (in tail) made to the grandfather, the tenant vouched to warranty one T. as cousin and heir of E. within age, and prayed that the parol might demur; the demandant said, that the vouchee nor any of his ancestors, &c. were seised after the seisin of his grandfather, of which seisin, &c. the tenant said, that the grandfather of the demandant levied a fine of the said tenements in demand to E. and demanded judgment if against the fine levied by his grandfather whose heir he is, he should to such averment be received: the demandant said that the stat. *ff. de donis conditionalibus*, avoided the fine levied by the ancestor in tail; and yet by judgment of the court he was ousted of the said averment, for there it is said, that though the stat. voided the fine as to bar the heir in tail of the action; nevertheless the fine remained in force to restrain the heir in tail from averring a thing contrary to the fine, as well the heir in fee-simple; and therewith agrees 22 E. 3. 17. and (c) 33 H. 6. 18. a. b. by Yelverton and others.

As to the third objection, a fine may be said *ritè levatus*, although *partes finis nihil habuer'*, for *ritè levat'* is as much as to say, within the intention of the said act, as duly levied, that is to say, in due form of law: for the same act doth oust the parties of such averment, and therefore *ritè levatus* ought to be so expounded; and a fine may be said levied in due form of law, although it be a fine merely by conclusion: and as to the said case in (d) 46 E. 5. it ought to be intended of a fine levied by a collateral ancestor, from whom the demandant did not claim the land, and then the averment is good, for *hæres dicitur ab hæreditate*, vide 19 H. 8. 6. b. by Inglefield and others; and 38 E. 3. 10. 36 H. 6. View 30. And in the said act it is said *earum partium hæredes*, which is to be intended

(a) Cr. Car. 524,
525. 1 Jones
458. 9 Co. 141.
a. Moor 251.

(b) 1 Leon. 83;

(c) Fitz. Estop-
pel 53.
Br. Fines 9.
Postea 89. b.

(d) 45 Ed. 1.
14. b. Antea 82.
b. 1 Leon. 78.

of such an heir who claims the inheritance from the ancestor who levied the fine: as if in a *formedon* of a gift made to the demandant's father, the tenant pleads the fine of the demandant's grandfather with warranty, &c. the demandant may plead, *quod partes finis nihil habuerunt*, but that such a one was seised and gave to his father in tail: so in an assise, if the fine of the demandant's father be pleaded whose heir he is, it is a good plea to say, *quod partes finis nihil habuerunt*, but that he himself was seised at the time, &c. and therewith agrees (a) 33 H. 6. 18. (b) 13 Aff. 8. (c) 13 E. 3. Replic. 62. 22 E. 3. 17. (d) 17 E. 3. 53. And as to the said book in 13 Aff. 8. it was affirmed for good law; for there is a difference when tenant in tail levies a fine *sur conusans de droit come ceo*, &c. and when he accepts such a fine, and makes a grant and render, for against a fine levied by tenant in tail, *sur conusans de droit come ceo*, &c. his heir cannot aver continuance, &c. in his ancestor, for that would be contrary to the fine, which is restrained by the stat. *de finibus*, as Fairfax, Littleton, and Brian held in 12 E. 4. 15. a 8 H. 4. 8. & 9. And so Shard said in the same book of 13 Aff. 8. But when tenant in tail accepts a fine, and (e) grants and renders the land by the same fine, (which is but executory) there, if no execution be sued in the life of the tenant in tail, his issue may aver continuance of possession, &c. in his father, for that well stands with the fine, for the acceptance of the fine *sur conusans de droit come ceo*, &c. which presupposeth a gift precedent, doth not alter the estate, and the grant and render, until it be executed, doth not devert any estate out of the tenant in tail, and by consequence, he continues tenant in tail, and therewith agree 41 E. 3. 14. 42 E. 3. 9. 8. Aff. 33. 11 H. 4. 85. a. And so, and according to this difference was it adjudged M. 3 & 4 Eliz. in the Common Pleas, Rot. 1483. Conisby's case, where the principal case was such; (f) Palmer and Mary his wife seised for the life of the wife as in her right, the remainder to Elizabeth Conisby in tail, the remainder to the said Elizabeth in fee; Palmer and Mary his wife levied a fine *sur conusans de droit come ceo*, &c. to the said Elizabeth with proclamations, who granted and rendered a rent of 27 l. 10 s. to the conusors, for the term of their lives, with clause of distress; and afterwards Elizabeth died, and the land descended to Henry Conisby, her son and heir in tail, who leased the land to one Parker for years; and afterwards Mary died; Palmer distrained for the rent, and he brought a replevin: and in that case two points were resolved and adjudged.

1. That against such fine accepted by tenant in tail, the issue might aver continuance of seisin by force of the tail

(a) Antea 89. a.

(b) Antea 88. b.

(c) Antea 88. b.

(d) Antea 88. b.

17 Ed. 3. 53.

(e) Plowd. 437.
b.

Conisby's case
M. 3 & 4 Reg.
Eliz.

(f) Benl. in
Kel. 210. pl. 15.
Benl. in Aff.
15. Dyer 213.
pl. 41. 1 And.
6. pl. 11.

tail, and the issue in tail is estopped by the admittance and acceptance of his ancestor.

2. That the grant and render of the rent was not within the statute of 4 H. 7. or 32 H. 8. because the fine was not levied of the land (a) itself, which was entailed but of a rent newly created out of the land: but in the said case of the Lord Zouch, it was resolved by all the Judges of the Common Pleas, that the statutes of 4 H. 7. and 32 H. 8. extended to fines levied by conclusion, and should bind the (b) estate-tail, although *partes finis nihil habuerunt*; as if tenant in tail makes a feoffment in fee, or be (c) disseised, and afterwards levies a fine with proclamations to a stranger, it shall bind the estate-tail, and the issues in tail are barred for ever. And it is to be observed, that the stat. of 32 H. 8. saith, "All fines levied of any lands, "tenements, or hereditaments, in any wise entailed to the "person so levying the same, or to any of his ancestors, &c." and the land is entailed to the person who levied the fine, altho' he was not seised thereof at the time. And in the stat. of 4 H. 7. (which is expounded by the act of 32 H. 8.) is a "saving "to every person or persons not party or privy to the said fine, "their exception, *quod partes finis nihil habuerunt*;" and the issue in tail is privy, for he claims as heir and by descent; *ergo*, he should not have such (d) averment. And afterwards, *scil.* M. 29 & 30 El. judgment was given accordingly, *scil.* that the demandant should be barred; which case I have reported more at large, because it is remarkable, and the first judgment which was given in the said point on the said stat. And it was said, that the said judgment did rule the point now in debate, for thereby it appears, if tenant in tail be disseised, and levies a fine, and dies before all the proclamations are passed, although the issue enters into the land, yet after the proclam. are made, he shall be barred, for he cannot say, *quod parte finis nihil habuerunt*: and it was said, if in case when tenant in tail hath nothing at the time of the fine levied, that the issue shall be barred by the said statutes; *a fortiori*, when tenant in tail at the time of the fine levied is seised of an estate-tail (be it in possession, reversion, or remainder) which may in truth (and not by conclusion only) pass by the said fine, the issue shall be barred by the said statutes.

Also in an. 20 El. in the case of one (e) Archer, in the Common Pleas, it was resolved by Sir James Dyer, Manwood, Mounson and Mead, that where lands were given to the grandfather and his wife in special tail, the grandfather died, the father disseised the grandmother, and levied a fine with proclamations; the grandmother died, the father died, that the son (f) was barred; and yet the father at the time of the fine levied, had but a possibility (the grandmother living) to the estate tail. Yet the Judges did expound

M 2

the

(a) Plowd. 435.
a. b. Cro. Ja.
699, 700.

2 Lev. 36.
(b) Cr. Eliz.
610. 1 Jones 33.
(c) Plowd. 434.
b.

(d) 1 Jones 35.

Note.

1 Co. 96. b.
Plowd. 434, &c.

(e) 9 Co. 141. a.
Hob. 258, 333.
1 Jones 33, 37,
39, 40, 81. Cr.
Car. 43 c. 2 Ro.
Rep. 374.
Winch. 110.
(f) 10 Co. 50. a.
Cr. Car. 435.
Cr. Jac. 591.
9 Co. 141. a.
Cr. El. 122, 610.
Hob. 258, 333.
Dyer 3 pl. 3.
Moer 252.

the stat. of 32 H. 8. (being an act of explanation) according to the letter, *scil.* that forasmuch as the land was entailed to his ancestor, although his ancestor was alive; so that no estate or right was descended to him which he could pass or extinguish; yet because the stat. saith, "intailed to the person" "so levying or to any of his ancestors" in the (a) disjunctive, it was held that the fine with proclamations did bar the right, which after the fine should descend to him, not only as to himself, but as to all the heirs in tail; *pari ratione* it was said that in the case in question, forasmuch as it is provided, that after the proclamations passed, the estate-tail shall be barred without any saving for the issue; the issue should be barred notwithstanding any claim by him, according to the letter and purview of the said act. And on these two cases of the Lord Zouch and Archer, it follows, that if the (b) grandfather be tenant in tail, and the father in his life having nothing in the land, levies a fine with proclamations, and afterwards the grandfather dies, and afterwards the father dies; that this fine shall bind the son, which, as was said, was a stronger case than the case now in question.

In Mich. 23 & 24 Eliz. in the Common Pleas, the case was such; Sir George Blunt was tenant in tail of divers manors in the counties of Salop and Stafford, and had issue a daughter, who was married to one Purflowe: and afterwards in Easter and Trin. term, 23 El. Sir George levied a fine of the said manors to one Lacon of Worcestershire, and died in August following. Purflowe and his wife brought a *formedon* and pending the plea proclamations passed; it was agreed by the whole court, that the tenant (c) should plead the fine and (d) proclamations which passed pending the writ, and bar the demandant; and yet in the said case a right of intail descended to the wife of Purflowe, and presently they sued their *formedon in le descender*, which was all they could do; for the fine is the conveyance which passes the estate, and the proclamations are but a short repetition of the fine, and are by the stat. of 32 H. 8. only added (as hath been said) to declare that it is a fine levied according to the stat. of 4 H. 7. which bars the estate-tail, and not a fine at the (e) common law: *ex hoc* four things are to be observed:

1. That tho' after the fine levied, a right of intail descended to the wife of Purflowe, yet after the proclamations past, the right which descended is barred by force of the (f) fine.

2. That although a *formedon* be brought and pursued, yet when after the proclamations pass, the fine is a bar; and what reason should there be that the issue should be more barred of his right which descends to him, and of his rightful action, which he hath pursued for the recovery of his right,

(a) Antea, fol.
51. a.

(b) Mo. 146, 147.
Antea 51. a. 61.
a. 1 Jones 34.
Hob. 258, 353.
Cr. Car. 435.

Purflow's Case,
Mich. 23 & 24
Reg. Eliz.

(c) 1 Jones 145.
(d) Cr. El. 362.

(e) Antea 88. a.
Co. Lit. 262. a.

(f) Cr. El. 589.

right, than the issue should be barred in the case in question, after the proclamations passed, notwithstanding his entry or claim *in pais*.

3. That when tenant in tail levies a fine and dies before proclamations, the issue in tail is not within any of the savings of 4 H. 7. for if he should be, then the bringing of his *formedon* before all are passed, and the pursuing of it would avoid the bar which the statute would make after the proclamations past.

4. That in such case the proclamations serve to no purpose, but only to distinguish that it is a fine levied according to the statute of 4 H. 7. For although the issue, having notice by the proclamations, brings his *formedon* accordingly, yet it shall not avail him.

Trin. 4. Eliz. a case was in the Com. Pleas, (as Bendlowes Serj. at Law reports) to this effect; (a) tenant in tail discontinues in fee, and disseises the discontinuee, and levies a fine *sur conusans de droit come ceo*, with proclamations to a stranger, and takes an estate by render in the same fine; and the discontinuee, before all the proclamations past, enters, and claims the land, and avoids the estate which passed by the fine, and afterwards proclamations passed, tenant in tail continues his possession and dies seised within the year after the entry and claim; the question was, if the heir in tail be (b) remitted, or if the entry of the discontinuee were lawful? and the unanimous opinion of the Justices was, that the heir in tail was not remitted, but that he was barred by the stat. of 32 H. 8. although the estate which passed by the fine was utterly avoided before the proclamations passed. By which it appears, that although the estate which passes by the fine be utterly defeated before the proclam. yet when afterward the proclam. pass, the estate tail shall be barred. And so the doubt which was conceived in the K.'s Bench, M. 38 & 39 Eliz. in an *ejecutione firmæ*, between (c) Harvey plaintiff and Facy defendant on a demise made by Robert Bret, Esq. of land in Northperton, where the same point was in question, and not adjudged; (for the said Robert Bret and Arthur Acclam, Esq. who was the lessor of the defend. did agree, and Bret, who claimed by the fine, had good part of the inheritance) was well resolved.

5. It was resolved that although the issue in tail be beyond the fea, yet forasmuch as he is privy, and out of all the savings of the stat. of 4 H. 7. he is bound, altho' he be beyond the fea, in the same manner as if the issue in tail was within age, or under coverture, or *non compos mentis*, or in prison; and this was agreed by all the Justices *nullo contradicente*. *Ex hoc sequitur*, that the entry or claim of the issue in tail, before all the proclamations are past, is not material; for if the entry or claim of the issue

(a) 1 And. 43.
172. 2 And. 177.
Benl. in Ash. 17.
N. Benl. 122.
p. 156. O. Benl.
30. Cr. El. 589
Benl. in Kelw.
210 b. Ow. 73.
Moor 115.
1 Brownl. 139.

(b) Moor 115.

2 Co. 56.
(c) Poph. 61.
2 And. 109.

in tail would be of any force, then it would be hard to bind them for want of claim, who have not power or intelligence to make an entry or claim, and their non-claim was not prejudicial to them by the rule and reason of the common law. And if the infancy, coverture, *non sanæ memoriæ*, or imprisonment of the heir in tail, in such case should give him power to avoid the fine, in that case no man would be assured of lands conveyed to him by fine.

Note, reader, there was never any judgment or resolution of any court against the third point resolved in this case; but the opinion of counsellors *arguendo* in Smith and Stapleton's case, Plow. Comm. 430. And the opinion of Brook, tit. Assurance 6. and Fines 109, (a) But those opinions are not only contrary to the said judgments and resolutions of the courts aforesaid, but would introduce great inconvenience in weakening of the general assurance of lands: and observe well all these points now resolved, and the said former judgments and resolutions cited in this case; for as I conceive they are grounded on profound and pregnant reason, tending to the repose and quiet of infinite inheritances.

(a) Ant. 83. b.
Sav. 88.

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F I N I S

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T H E
F O U R T H P A R T
O F T H E
R E P O R T S
O F

Sir EDWARD COKE, Knt.

The KING'S ATTORNEY-GENERAL,

O F

Divers Resolutions and Judgments given upon solemn Arguments, and with great Deliberation and Conference of the most reverend Judges and Sages of the LAW, of Cases difficult, in which are great Diversities of Opinions, and which were never resolved or adjudged, or reported before: And the Reasons and Causes of the said Resolutions and Judgments.

Published in the First Year (the Spring-time of all Happiness) of the most happy Reign of the most High and most Illustrious JAMES King of England, France, and Ireland, and of Scotland the XXXVII. the Fountain of all Piety and Justice, and the Life of the LAW.

With REFERENCES to all the BOOKS of the COMMON LAW, as well Ancient as Modern: And the PLEADINGS in ENGLISH, carefully Revised and Corrected.

Abominabiles Regi qui agunt impie, quoniam Justitia firmat solium.

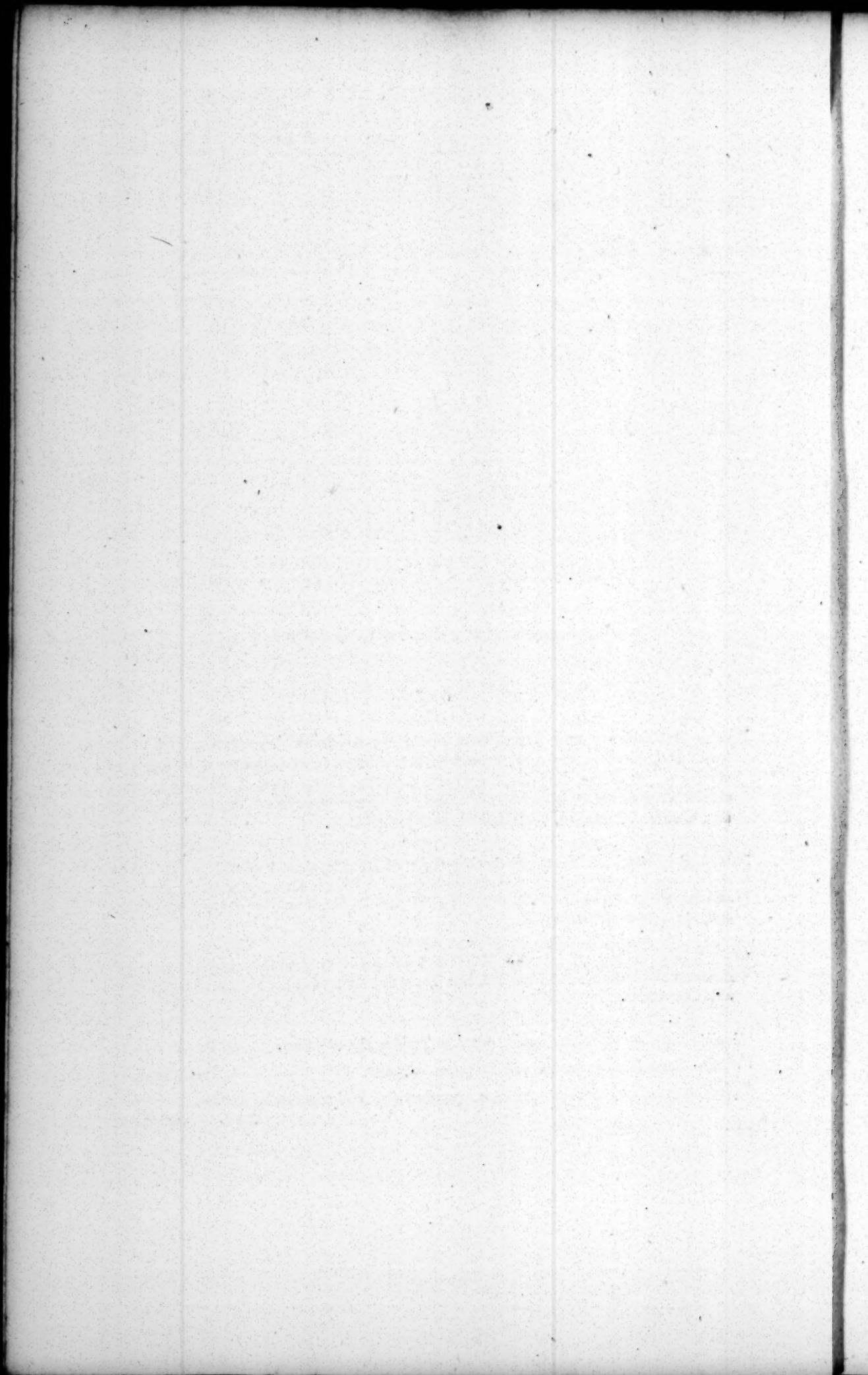
PROV. xvi. 12.

Voluntas Regis labia justa, qui recta loquitur diligetur.

PROV. xvi. 13.

Custodi innocentiam, & vide æquitatem, quoniam sunt reliquæ homini pacifico.

PSAL. xxxvii. 37.



T O T H E

R E A D E R.

NIHIL planè est quod de legibus dici aut scribi potest (licet spaciosus sit ille campus & argumentum penè infinitum) quod mea quidem sententiâ ad sex capita, de iisdem, videlicet, condendis, corrigendis, dirigendis, exponendis, addiscendis, & observandis nequeat reduci. In condendis vero legibus, sex sunt quæ inter alia veniunt precipuè consideranda. Ac primum quidem ipsius in qua feruntur πολιτικῆς forma, quando alia ratio sit ubi regimen est monarchicum, alia ubi aristocraticum, ubi democra-

THERE is nothing that can be said or written of laws, although the field be large, and the common place thereof may seem to be infinite, but in mine opinion may be reduced to one of these six heads, making, correcting, digesting, expounding, learning, and observing. Of laws concerning making of new, six things amongst many others do principally fall into consideration. First, under what form of commonwealth the law-makers be governed; for one consideration is requisite where the government is monarchical, another when

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when it is aristocratical, and a third when it is democratical. Secondly, to know the several kinds of the municipal laws of his own proper nation: for the innovation or change of some laws is most dangerous, and less peril in the alteration of others. Thirdly, to understand what the true sense and sentence of the laws then standing is, and how far forth former laws have made provision in the case that falleth into question. Fourthly, by experience to apprehend what have been the causes of the danger or hindrance that hath fallen out in that particular to the commonwealth, either in respect of time, place, persons or otherwise. Fifthly, to foresee that a proportional remedy be applied so, as that for curing of some defects past, there be not a stirring of more dangerous effects in future. Sixthly, the mean, and that only is by authority of the high (that in troth is the highest) court of parliament. Concerning the

(2) correction of old, the same respects are to be observed, that have been said touching the making of new. For dig-

(3) gesting of former laws into method and order, three things are requisite: judgment to know them, art to dispose them, and diligence

ticum rursus alia. Alterum vero est legum municipalium, quæ nationi illi propriæ sunt, in singulis suis generibus certa cognitio quandoquidem periculosa magis sit harum quam illarum legum sive antiquatio, sive innovatio, sive denique immutatio. Tertium est, ut verum sensum atque sententiam illarum legum quæ tum obtinent, necnon quousque leges superiores causæ controversæ prospexerint teneamus. Quartum, ut rationes periculi aut damni, si quid in illo casu reipublicæ acciderit, respectu temporis, loci personarum, aut undecunque alias, experientia assequamur. Quintum, diligens cautio est, ut remedium aptum atque commodum sic adhibeatur, ne dum aliquibus malis præteritis mederi cupimus, futura alia longè periculosiora excitemus. Ultimum est legum ferendarum medium quod totum in magnæ illius & supremæ sane curiæ parliamenti auctoritate positum est legum antiquarum emendationem quod attinet, eadem plane cautiones observandæ sunt, quas in condendis novis supra attigimus. Ad leges

leges vero superiores in methodum atque ordinem dirigendas, tria requiruntur; judicium ad eas cognoscendas, ars ad disponendas, denique diligentia ad complectendas singulas ne quæ omittatur. Legum expositio ordinariè quidem reverendos judices regni que sapientes spectat, in maximis vero difficilissimisque causis supremum parliamenti judicium. De addiscendis legibus earumque scientia assequenda in præfatione ad primum meum librum paucula attingi. Legum observatio omnes quidem in genere respicit, præcipuè verò ac speciatim nonnullos, ut postea annotabitur, nam summa sequar fastigia rerum. Status hujus regni monarchicus est, & originis jure hæreditario inherenter successivus: absolutissima sane perfectissimaque πολιτεία forma utpote quæ interregnum atque infinita simul incommoda penitus excludat. Habetur enim in communi jure axioma, regem Angliæ nunquam mori: quod sane verum est respectu perpetuò durantis, & nunquam morientis politicæ capacitatis. Leges hic in Angliā tripartitæ; jus

to omit none of them. The expounding of laws doth ordinarily belong to the reverend Judges and sages of the realm: and in cases of greatest difficulty and importance to the high court of parliament: concerning learning, and attaining to the knowledge of these laws, I have in the preface of my first book, somewhat touched. The observing of laws, doth concern all whatsoever; but principally some in particular, as hereafter shall be touched, for *summa sequar fastigia rerum*. Our kingdom is a monarchy successive by inherent birthright, of all others the most absolute and perfect form of government, excluding interregnum, and with it infinite inconveniencies; the maxim of the common law being, that the King of England never dieth, which is true in respect of the everdying, and never dying politic capacity. The laws of England consist of three parts, the common law, customs, and acts of parliament: for any fundamental point of the ancient common laws and customs of the realm, it is a maxim in policy, and a trial by experience, that the alteration of any of them is most dangerous; for that which hath

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hath been refined and perfected by all the wisest men in former succession of ages, and proved and approved by continual experience to be good and profitable for the commonwealth, cannot without great hazard and danger be altered or changed. Infinite were the scruples, suits, and inconveniencies that the statute of 13 E. 1. *de donis conditionalibus* did introduce, which intended to give every man power to create a new found estate in tail, and to establish a perpetuity of his lands, so as the same should not be aliened nor letten, but only during the life of tenant in tail, against a fundamental rule of the common law, that all estates of inheritance were fee-simple; whereupon these inconveniencies ensued, purchasers defeated, leases evicted, other estates and grants made upon just and good consideration were avoided, creditors defrauded of their just and due debts, offenders imboldened to commit capital offences, and many other inconveniencies followed: also, what suits and troubles arose by the statute of 34 Ed. 3. of *nonclame*, enacted against a main point of the com. law, whereby ensued the universal trouble of the K's subjects, as it was resolved in

commune, consuetudines, ac decreta comitiorum: jam principia atque fundamenta juris communis & consuetudinem regni quod attinet, axioma politicum est, usu atque experientia ratum, periculosissimam esse uniuscujusque eorum alterationem: quod enim a sapientissimis olim viris longa ætatum serie politum ac perfectum est, inde vero assidua experientia bonum atque utile reipublicæ probatum & approbatum, illud sine magno periculo ac discrimine mutari aut alterari nequit. Infiniti fuerunt scrupuli, lites, & incommoda ex statuto, 13 E. 1. de Donis conditionalibus, introducta: ubi cautum fuit ut penes unumquemque esset recens excogitatum jus taliatum, hoc est limitatum, incisum aut restrictum creare; terrarum insuper suarum perpetuitatem quandam stabilire, adeo ut neque alienari, neque locari, nisi durante naturali vita tenantis illius (ut loquimur) taliati possent: atque hoc contra fundamentale principium juris communis, videlicet, quod hæreditatum jus omne per feudum simplex transfiret: unde incommoda hæc aliaque plurima sequuta sunt, emptores

res defraudati, locationum formulæ evictæ, status alii atque donationes æquis bonisque rationibus concessæ penitus frustratæ, emundæ argento creditores, fontes ad capitalia flagitia perpetranda animati. Adhæc cuius etiam vel mediocriter instituto apparet, quæ lites, quantæ turbæ, ex statuto illo ortæ sunt: 34. Ed. 3. cui titulus de non repolcendo, nobis non claime, lato contra juris communis præcipium fundamentum; unde tot molestiæ subditis exhibitæ velut in comitiis illis, 4 H. 7. cap. 24. conclusum ac definitum est. Quam vero subtiles ac spinosæ quæstiones indies pullularunt de validitate atque interpretatione testamentorum quibus datæ sunt terrarum hæreditates, quæ tamen jure communi, ante statuta testamentaria, 32 & 34 Hen. 8. legari non poterant, quotidiana experientia clarè docet, ad multorum quidem ruinam, plurimorum vero damnum ac detrimentum. Atque præ cæteris, recentes quædam inventiones ac commenta, in satisfatione firmandisque terrarum possessionibus, per limitationem quorundam usuum, sub novis & fanaticis cautioni-

parliament in 4 H. 7. cap. 24. is apparent to all of least understanding: what intricate and subtle questions in law daily arose upon the validity and construction of wills of lands, which by the rule of law were not devisable before the statutes of 32 & 34 H. 8. of wills, daily experience to the ruin of many, and hinderance of multitudes manifestly teacheth. But above all, certain late inventions and devises in assurances of lands by limitation of uses, under upstart and wild provisoes and limitations, such as the common law never knew, do breed and multiply infinite troubles, questions, suits, and difficulties: in the Parliament holden in the 20 year of King Henry III. it was moved that children born before marriage (being bastards by the common laws of this realm, the wisdom of the law abhorring clandestine contracts) might be legitimate according to the civil or ecclesiastical laws, whereunto saith the statute, omnes Comites & Barones una voce responderunt, nolumus leges Angliæ mutare que hucusque usitatæ sunt & approbatæ: in which few words is observable; first, the absolute concord and unity, una voce, of all the Peers and

and Lords of Parliament : secondly the denial, *nolumus leges Angliæ*, not of Normandy, or of any other nation, as is fondly dreamed, as elsewhere I have shewed, but the common law of England : and thirdly, the reason of their denial : *quæ hætenus usitatæ sunt & approbatæ*, as if they would have said, we will not change the laws of England, for that they have been anciently used and approved from time to time by men of most singular wisdom, understanding and experience. I will not recite the sharp law of the Locrenses in Magna Græcia, concerning those that sought innovation in preferring any new law to be made, you may read it in the gloss of the first book of Justinian's Institutes, because it is too sharp and tart for this age : but take we the reason of that law, *quia leges figendi & refigendi consuetudo est perniciofa*. But Plato's law I will recite touching this matter, which you may read in his 6th book *de Legibus* ; if any citizen do invent any new thing, which never before was read or heard of, the inventor thereof, shall first practise the same for the space of 10 years in his own house, before it be brought into the commonwealth, or published to the people, to the

bus, quas ne novit quidem jus nostrum, infinitas plene turbas, quæstiones, lites, ac difficultates & pariunt, & multiplicant. In comitiis habitis anno 20 Hen. 3. propositum & rogatum est, ut liberi ante matrimonium nati (quos omnes jus nostrum commune (prudenter quidem abhorrens a clandestinis nuptiis) habet pro spuris) ex instituto juris civilis aut ecclesiastici, fierent legitimi; cui (inquit lex) omnes Comites & Barones una voce responderunt, nolumus leges Angliæ mutare, quæ hucusque usitatæ sunt & approbatæ. In quibus verbis (numero sane paucis) observari potest. 1. Absoluta concordia atque unitas, una voce, omnium, scilicet, Comitum & Baronum in Comitiis. 2. Negationis forma, nolumus leges Angliæ, non Normanniæ, aut alterius cujusvis nationis, ut nonnulli imprudenter somniant (sicut alibi ostendimus) sed jus commune Angliæ. 3. Negationis ratio, videlicet, quæ hætenus usitatæ sunt & approbatæ: ac si dixissent, nolumus mutare leges Angliæ, utpote de tempore in tempus a viris singulari prudentia, ingenio,

nio, experientia præditis antiquitus usurpatae atque approbatas. Nolo hic commemorare Locrensum illud in Magna Græcia decretum sane asperum, in eos latum qui novis rebus studentes, legem aliquam novam atque inauditam rogarent: apud Justinianum in glossa ad primum librum institutionum lectu est, & vereor ut huic ætati acefcat plus satis: rationem tantum illius decreti sic habere, Quia leges figendi & refigendi consuetudo est periculosissima. Platonis vero legem de hac re recitabo, quæ habetur apud cum 6 de Legibus: si quis Civis nondum quid & inauditum invenerit, illud ad decennium in suis ædibus inventor exerceat, hoc fine, ut si utile probetur inventum profit auctori, sin vero malum, ipsi soli, non rei publicæ noceat. Probo etiam & edictum illud a Suetonio relatum, videlicet: Quæ præter consuetudinem & morem majorum sunt, neque placent, neque recta videntur. Atque sane discuperem Honorii & Arcadii institutum illud a nostratibus observari, nimirum; mos fidelissimæ vetustatis retinendus est: Sentio denique & concludo rem hanc Periandri

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end that if the invention be good, it shall be profitable to the inventor, and if it were nought, he himself, and not the commonwealth might taste of the prejudice. And I like well the edict reported by Suetonius; quæ præter consuetudinem & morem majorum fiunt, neque placent, neque recta videntur. And I would the commandment of Honorius and Arcadius were of us Englishmen observed, mos fidelissimæ vetustatis retinendus est: and I agree and conclude this point with the apothegm of Periander of Corinth, that old laws and new meats are fittest for us. As concerning the correcting of the common laws, or ancient customs of England, may be applied all that hath been said concerning making of laws: only this add; that it hath been an old rule in policy and law, that *correctio legum est evitanda*. And yet concerning certain of our penal statutes, to repeal many that time hath antiquated as unprofitable, and remain but as snares to intangle the subjects withal; and to omit all those that be repealed, that none by them be deceived, as for example concerning drapery, or such like. To make one plain and

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perspicuous law divided into articles, so as every subject may know what acts be in force, and what repealed, either by particular or general words, in part, or in the whole, or what branches and parts abridged, what enlarged, what expounded: so as each man may clearly know what and how much is of them in force, and how to obey them, it were a necessary work, and worthy of singular commendation: which his majesty out of his great wisdom and care to the commonwealth, hath commanded to be done: for as they now stand it will require great pains in reading over all, great attention in observing, and greater judgment in discerning upon consideration of the whole, what the law is in any one particular point: but with this caution that there be certain statutes concerning the administration of justice, that are in effect so woven into the common law, and so well approved by experience, as it will be no small danger to alter or change them: and herein, according to his royal commandment (God willing) somewhat in due time shall be perform'd. For bringing of the com. laws into a better method, I doubt much of the fruit of that labour.

Corinthii illo Apothegmate; antiquis legibus, & cibus recentibus utendum esse. Juris vero communis & consuetudinum Angliæ antiquar' emendation' quod attinet eo referatur quicquid de condendis Legibus dictum est; unum id addas, receptam olim fuisse cum in reipublicæ administratione, tum in jurisprudentia, regulam, quod correctio legum est evitanda operæ precium tamen interea esset, & singulari laude dignum, ex Statutis nostris pœnalis multa rescindere atque abrogare, quæ diuturnitas temporis tamquam inutilia antiquavit, & subditis tantum illa querendis inserviunt: ea item omnia omittere quæ jamdudum abdicata sunt, ne quis illis fallatur, veluti de Pannaria, aut consimilibus; unum denique idque perspicuum juris quasi corpus condere, ita in articulos distributum, ut quisvis subditus intelligat, quæ Statuta obtineant, quæ abrogenter, sive specialibus sive generalibus verbis, vel in parte, vel in toto; tum etiam quæ membra aut partes restringuntur, quæ dilatantur, quæ exponuntur, ita ut cuius pateat quid quan-

quantumque in iis valeat, atque tum illa quid jubeant, tum hic quomodo pareat; id quod *Ma. Regia* pro singulari ejus prudentia atque cura erga rempublicam jussit fieri: nam ut se nunc habent statuta, requirent profecto & in perlegendo ingentem operam, & in observando magnam intentionem, maximum vero in discernendo judicium, ut dum quis omnia pensilet, quid *Lex* sit vel in uno aliquo articulo clare pronunciet. Hic tamen moneri te volo, esse quædam statuta quæ justitiæ administrationem respiciunt, ita juri communi intertexta & involuta, adeoque experientia ipsa comprobata, ut periculosum plane esset & convellere aut immutare: verum hac quidem in re ex mandato *Regio* siquidem *Deus* dederit, opportuno tempore aliquid fiet. Quod vero ad reductionem *Juris Communis* in commodiorem Methodum attinet, de illius laboris fructu plurimum dubito; illud scio, quod compendiæ in multis quidem scientiis authoribus ipsis profuerunt, verum aliis (præsertim ut nunc usurpantur) non mediocri-

This I know, that abridgments in many professions have greatly profited the authors themselves; but as they are used, have brought no small prejudice to others: for the advised and orderly reading over of the books at large in such manner as elsewhere I have pointed at, I absolutely determine to be the right way to enduring and perfect knowledge, and to use abridgments as tables, and to trust only to the books at large: for I hold him not discreet that will *seclari rivulos*, when he may *petere fontes*. And certain it is, that the tumultuary reading of abridgments, doth cause a confused judgment, and a broken and troubled kind of delivery or utterance: but to reduce the said penal laws into such method and order, and with such caution as it abovesaid (which cannot be done but in the High Court of Parliament, nor without the advice of such as before is touched) were an honourable, profitable and commendable work for the whole commonwealth. This 4th part of my Reports doth concern the true sense and exposition of the laws in divers and many cases, never adjudged or resolved before: which for that they may, in my opinion, tend to

the general quiet and benefit of many, the only end (God knoweth) of the edition of them; I thought it a part of my great duty that I owe to the commonwealth not to keep them private, but being withal both encouraged, and in manner thereunto enforced, to publish and communicate them to all, wherein my comfort and contentation is great, both in respect of your singular and favourable approbation of my former labours, as for that I (knowing my own weakness) have one great advantage of many famous and excellent men that have taken upon them the great and painful labour of writing: for they, to give their works the more authority and credit, have much used the figure prosopopeia in feigning divers Princes, and others of high authority, excellent wisdom, profound learning, and long experience, to speak such sentences, rules, and conclusions, as they intended and desired for the common good, to have obeyed and observed, as Xenophon the great in his book which he wrote of the institution of Princes, feigneth that King Cambyfes taught and spoke many excellent things to Cyrus his son; and in another book

ter obfuerant. Illud enim absolute statuo (quod & alias etiam attigi) majorum librorum studiosam & methodicam perfectionem, certam viam ac rationem esse ad constantem perfectamque jurisprudentiam affequendam: interim compendiis tanquam indicibus utendum cenfeo, libris vero ipsis innitendum ac fidendum; neque enim prudentis arbitror seclari rivulos, ubi fontes ipsos petere liceat. Et sane constat tumultuariam compendiorum lectionem, confusum judicium & interruptam ac perturbatam elocutionem causare. Leges vero pœnales in eam methodum atque formam (adhibitis insuper cautionibus quas supraposuimus) reducere, (quod non nisi in honorario committorum conventu, neque sine eorum quos prius attigimus consilio fieri potest) opus esset universæ reipub. utile; laudabile, gloriosum. Quarta hæc pars relationum meorum, verum sensum atque expositionem legum in multis capitibus nunquam prius judicatis aut definitis continet: quæ quia ad commune multorum bonum ac tranquillitatem (mea opinione) spectare videntur, (quem novit Deus) unum mihi finem in illis edendis fuisse

fuisse propositum, officii mei erga rempub. putavi eas non suppressere, verum efferre in lucem omnibusque publicare, ad id præsertim non invitatus modo, sed tractus quasiq; compulsus: qua quidem in re magna mihi solatio est, tum singularis vestra superiorum mearum elucubrationum approbatio, tum qd' imbecilitatis meæ conscius, illud unum mihi præ multis illustribus sane ac præstantissimis viris, qui difficilem hunc scribendi laborem susceperunt commodè accidit, quod illi quo fidem atque auctoritatem operibus suis conciliarent, figura illa quam Prosopopæiam vocant sæpius usi sunt dum multis principib' aliisq; in summa potestate constitutis, denique excellenti prudentia recondita doctrina, longa experientia viris, eas sententias, regulas ac conclusiones affinxerunt, quas ipsi ad bonum publicum recipi atque observari volebant & cupiebant: ita magnus ille Xenophon in libro quem de institutione principis scripsit, fingit imprimis quod Cambyfes ipse Cyrum filium multas res præstantissimas docuit; & rursus de disciplina militari sermonem instituens, regem Philip-pum inducit, Alexandrum

which he wrote of the art of chivalry, he feigneth how K. Philip taught and instructed his son Alexander to fight. But I, without figure, or feigning, do report and publish the very true resolutions, sentences and judgments of the reverend Judges and sages of the laws themselves, who for their authority, wisdom, learning, and experience, are to be honoured, revered, and believed. The due observation of the said laws doth generally without any limitation or exception concern all: but principally Princes, Nobles, Judges, and Magistrates, to whose custody and charge the due execution (the life and the soul of the laws) is committed; for that they in respect of their places are more eminent and conspicuous than other men, wherein three things are necessarily required, understanding, authority, and will: understanding concerneth things and persons; that is, first what is right, and just to be done, and what ill, and to be avoided; secondly, what persons for merit are to be rewarded, and what for offences to be punished: and both in reward and punishment to observe quantity and quality. Authority to protect the good, and to chastise the ill. Will

prompt and ready duly, sincerely, and truly to execute the law. But forasmuch as many adversaries, and two open enemies do continually lie in wait to assault this good and ready will, it must of necessity have two defensive complete armours of proof: first integrity against these 6 secret adversaries, gifts, affections, intreaty, anger, precipitation, and *morosa cunctatio*, peevish delay. Secondly, fortitude and constancy against the terror of malice and fear of danger, two open and violent enemies: *videte judices quid faciatis, non enim hominis exercetis judicium sed domini, & quodcunq; judicaveritis in vos redundabit.* And *Deus est Judex justus, fortis, & patiens*, and so must every Judge be. *Justus*, without respect, to give every man his own: and therefore *judicia* are so called, because they are *tranquam juris dicta*, and the law whereby you judge *est mens quædam nullo perturbata affectu*, *Arist. lib. 3. Polit.* *Fortis* against malice and danger, *neq; timida probitas, neq; improba fortitudo rei publicæ est utilis.* And *patiens*, when he doth justice sincerely and with a good conscience, and yet is despised, despited, or disgraced: *non*

filium suum ad pugnam instituentem: ego vero sine figura aut fixatione omnino aliqua, fero in publicum ipsissimas quidem solutiones, sententias ac judicia, reverendissimorum Judicium legumque Antistitum, qui propter auctoritatem, prudentiam, doctrinam, atque experientiam, facile honorem, reverentiam ac fidem merentur. Jam vero *legum justa observatio, ut in genere omnes absque ulla limitatione aut exceptione respicit, ita præcipue principes, nobiles, judices, ac magistratus, quorum fidei & tutelæ earum debita administratio (quam vitam atque animam legum vero dixeris) committitur ac demandatur; quando illi respectu ordinis & loci quem obtinent, longe eminentiores atque conspicui præ aliis existunt. Hic ergo tria necessariò requiruntur, judicium, auctoritas, voluntas: judicium res aut personas respicit, id est, primo quid factu rectum justumque, quid item malum ac declinandum.* 2. *Quibus præmia meritò debentur, quibus etiam pænæ; ac ut in utrisque quantitas & qualitas juste observetur: auctoritas ad bo-*

^a Paralip.
xix. vers. 6.

bonos tuendos, malos puniendos: denique voluntas prompta atque expedita ad synceram ac debitam legum executionem: quoniam vero multi adversarii & presertim duo hostes aperti, jussu huic ac promptæ voluntati semper insidiantur, duplici armatura gravi & defensiva opus est. 1. Integritate adversus sex latentes hostes, viz. Dona, affectiones, rogationes, iras, præcipationem, & morosum cunctationem. 2. Fortitudine & constantia contra terrorem malitiæ, & timorem periculi, qui duo hostes sunt aperti acerrimique. Videte Judices quid faciatis, non enim hominis exercetis judicium sed Domini, & quodcunque judicaveritis, in vos redundabit. Deus est Judex justus, fortis, & patiens, talem decet esse omnem Judicem. Justum, sine respectu quod suum est cuique dando, ideoque judicia sic dicuntur quasi juris dicta: & lex secundum quam judicium fit, est mens quædam nullo perturbata affectu, Arist. polit. 3. Fortem, contra malitiam & periculum: nam neque timida probitas, neque improba fortitudo reipub. est utilis. Denique Patientem, ut sincerè & ex

solum pœna, sed patientia acquirat nomen persecutionis, & gloriam victoriæ. Aristotele, lib. 2. Top. Melius est judicare secundum leges & literas, quam ex propria scientia & sententia. Ignorantia judicis est plerumque calamitas innocentis, and therefore it proceedeth that the Kings of this realm have had such special care of calling such men to judicial places, as have knowledge, and other the incidents inseparable above-mentioned. And because these Judges are (if order be observed) taken of such as be Serjeants, especially care is always taken in calling men of learning, integrity, and living to that state and degree; never can a Judge punish extortion, that is corrupted himself, nor any magistrate punish any sin as he ought that is known to be an offender therein himself; therefore it is an incident inseparable to good government, that the magistrates to whom the execution of laws is committed, be principal observers of the same themselves. But herein hear what shall be said, to which nothing can be added; et nunc reges intelligite, erudimini qui judicatis terram, Servite Domino in timore, & exultate ei

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cum

cum tremore, apprehendite disciplinam, ne quando irascatur Dominus, & pereatis de via justa. Whosoever will be complete Judges, *intelligite, apprehendite, erudimini, servite, exultate,* you must be apparelled with the rich robes of understanding and learning, you must yourselves embrace discipline, you must observe the laws yourselves, with great fear and humility, which if you will do, *servite Domino in timore;* you must be chearful, and comfort yourselves in doing justice, for you shall find many crosses and dangers. *Et exultate,* but yet *cum tremore,* do all these things lest ye enter into wrath, and so ye perish from the way of righteousness; whereby it appeareth, that the greatest loss a Judge or magistrate can have, is to give himself over to passion, and his own corrupt will, and to lose the way of righteousness, *et pereatis de via justa.* To the whole body of the realm concerning this point, I say, your fault will be the greater, if having a Sovereign so religious, wise, and learned, so great an observer of laws, so virtuous of his own person, you apply not yourselves to his example and precedent; for the heathen

pura conscientia justitiam administret, licet inde descipatui, opprobrio, fortè etiam ludibrio habitus sit; nam non solum pœna, sed patientia acquirit nomen persecutionis, & gloriam victoriæ. Arist. 2. Top. Melius inquit est judicare secundum leges & literas, quam ex propria scientia & sententia. Ignorantia judicis est plerumque calamitas innocentis. Atque hinc est quod regibus nostris illud imprimis curæ semper fuit, ut ad jus publicè dicendum eos promoverent qui scientia aliisque supradictis virtutibus præpollerent. Et quoniam judices hii ordinariè quidem ex servantibus ad legem eliguntur, cautum præcipuè est, ut ad statum & gradum illum non nisi viri doctrinâ, integritate, opibus pares vocentur. Neq; enim potest judex de pecuniis repetundis alium damnare qui est ipse compilator: neque cuiusvis magistratus crimen aliquod uti par est punire cujus ipse reus esse dignoscitur. Illud ergo in omni bene instituta repub. necessariò requiritur, ut magistratus quibus legum administratio committitur, easdem ipsi præ aliis observent, ad quam
rem

rem sententiam illam (cui nihil addi potest) apponam: et nunc reges intelligite, erudimini qui iudicatis terram: servite Domino in timore, & exultare ei cum tremore, apprehendite disciplinam, ne quando irascatur dominus, & pereatis de via justa. Qui iudices completi esse vultis intelligite, apprehendite, erudimini, servite, exultate, preciosis imprimis vestibus intelligentiæ & doctrinæ indui ipsos vos oportet, disciplinam apprehendere, leges observare, idque magno cum tremore ac humilitate; quod ut facere possitis, servite Domino in timore: alacres sitis oportet, & conscientia justitiæ administratæ solari vos, siquidem multas invenietis tribulationes, multa pericula; sed exultate, verum cum tremore: hæc omnia facite, ne quando irascatur dominus, & pereatis de via justa. Unde patet quod gravissima jactura quam judex aut magistratus potest facere, in eo est ut passioni sese ac corruptæ suæ voluntati tradat, atque ita pereat de via justa. Illud denique toti reipub. nostræ corpori dico atque edico, quod graviore omnes culpa rei

poet could say; *regis ad exemplum totus componitur orbis.* But whilst I was intending and going about this edition, I, by commandment, attended upon his most excellent Majesty for direction about his Highness's affairs that concerned the duty of my place to prosecute; at what time I well perceived what princely care his Majesty had taken for execution and expedition of justice, and that upon consideration thereof he found two impediments therein: one, that in the two eminent courts of ordinary justice, the King's Bench, and the Common Pleas, there were four Judges; and many times in cases of great difficulty, the Judges being equally divided in opinion in either court, the matter depended long undecided: for preventing whereof his majesty in this term of Saint Hilary, in the first year of his most happy and prosperous reign, added a Judge more to either Bench, Sir David Williams, Kt. Serjeant at law, to the King's Bench; and Sir Wm. Daniel, Kt. Serjeant at Law to the court of Common Pleas, his Majesty saying, that *Numero Deus impare gaudet.* The second impediment was, that divers doubts and questi-

questions of law remained undetermined, the same rising partly upon long and ill-penned statutes lately made, partly by reason of late, and new devises and inventions in assurances, which the eye of the law in former ages never beheld, and cannot yet incline to allow them, and partly by conveyances and wills drawn and devised by such as have *scientiam scilorum quæ est mixta ignorantia*: which questions and doubts already grown, his Majesty desired might be resolved and determined according to the true sense of the laws of the realm. And where there have been some diversity of opinions between certain of the courts of Justice, that the same might upon conference and mature consideration be agreed and resolved. And his Majesty understanding (as it seemeth) by reason of my former editions, that I have observed many determinations and judgments of questionable and doubtful cases, which upon great study, consideration, conference and deliberation, have been resolved and given by the reverend Judges and fathers of the law, required me to proceed, and for the general good and quiet of the subject to publish them, whose

tenebimur, siquidem regem habentes adeo pium, prudentem, doctum, diligentem legum virtutumq; omnium cultorem; illius nos exemplo non accommodemus, quando poeta ethnicus dicere potuit? Regis ad exemplum totus componitur orbis. Interea verò dum huic editioni operam dabam, Regiam Majestatem ex mandato adii de celsitudinis ipsius negotiis quibusdam ordinandis, quorum administratio munus meum spectabat; quo quidem tempore illud imprimis perspexi, quam impense Magistr. ipsius execution' atque expeditionem justitiæ curaverat, quodq; re mature pensitata, duo ejus impedimenta invenisset: unum quod in duabus eminentissimis justitiæ ordinariæ curiis (Banco, viz. tam Regio, quam Communi ut loquimur) quatuor tantum judices essent, unde sæpius usu venit, ut in causis perplexis & difficilioribus, æqualiter divisas ac discrepantib' Judic' in utraq; curia sentent', lis non decisa diutius penderet: cui mala ut occurreret, placuit Majest. ejus in hoc term' S. Hil', an' 1º felicissimi ipsi ac florentissimi regni, utrique Banco (ut loquimur) judicem

cem quintum addere: regio quidem Dav. Williams equidem, servientem, ad legem, communi vero Gulielmum Daniel equitem, servientem item ad legem: dicente insuper Majest. sua, quod Numero Deus impare gaudet. 2. Impedimentum fuit, quod multæ questiones dubiæ adhuc maneant non definitæ; quæ quidem ortæ sunt, partim ex statutis quibusd' recentiorb' perplexis ac male scriptis; partim ex commentis atq; inventionibus novis in patetis firmandis & satisfactionibus: quales neque vidit oculus juris apud sæculum prius, neque etiam adduci potest ut approbet aut amplexetur: partim deniq; ex passionibus & Testamentis scriptis factisq; ab iis qui scientiam habent Sciorum, quæ est mixta ignorantia. Quæ sane questiones atque controversiæ jamdiu ortæ, ut secundum verum sensum legum hujus regni solvantur, Majest. ipsi magnopere desideravit; nec non ut discrepantes, sententiæ atque opiniones judicariæ in diversis foris ortæ, communi consilio & matura deliberatione componantur atq; determinentur. Quin & certior factus Rex, ut videtur, quod in

commandment being to me *suprema lex*, hath both encouraged and imposed a necessity upon me to publish this 4th edition: which containeth nothing but his Majesty's own, being sweet and fruitful flowers of his crown; for the laws of England are indeed so called, *jura coronæ*, or *jura regia*: because as Bracton, lib. 1. cap. 8. saith: *ipse autem Rex, non debet esse sub homine, sed sub Deo & lege, quia lex facit Regem: attribuat igitur Rex legi, quæ lex attribuit ei, videl' domination' & imperium: non est enim Rex ubi dominatur voluntas, & non lex*: that is, the King is under no man, but only God and the law; for the law makes the King: therefore let the King attribute *that* to the law, which from the law he hath received, to wit, power and dominion: for where will, and not law doth sway, there is no King. And in the Register the words of the writ of *ad jura regia*, be, *Rex, &c. salutem: ut jura nostra regia ne depereant, seu per aliquorum usurpationes indebitas aliquantulum subtrahantur, quantum juste poterimus manutenenda, subtrahætaque & occupata, si quæ fuerint ad statum debitum* re-

revocanda, necnon ad impugnatores eorundem jurium nostrorum refrænandos, & prout convenit juxta eorum demerita puniendos, eo studiosius nos decet operam adhibere, & sollicitius extendere manum nostram, quo ad hoc vinculo juramenti teneri dignoscimur & astringi, pluresque conspiciamus indies jura illa pro viribus impugnare, &c. 1. That our king-ly laws and rights perish not, neither be at all withdrawn by undue usurpation of any, which so far forth as justly we may, are to be maintained, and if any shall be withdrawn or diverted, to be again restored to their due state; as also for the bridling of the impugnors of those our said laws, and the punishing of them as is mete according to their deserts, we ought the more diligently to provide, and the more carefully to extend our hand and authority; for that we are known to be thereto tied and bound by the bond of an oath, and for that we daily see very many to their powers to impugn those said laws. And again, Rex, &c. salutem. Ad conservationem Jurium Coronæ nostræ, eo nos decet studiosius operam adhibere, quoad hoc astringimur vinculo sacra-

superioribus meis elucubrationibus multas causarum dubiarum atque perplexarum decisiones ac conclusiones retulerim, quæ magno sane studio, consilio, deliberatione per reverendos Judices ac patres juris datæ fuerint, progredi me jussit, easque ad publicum bonum atque tranquillitatem subditorum divulgare: cujus sane mandatum (quod supremæ legis loco habeo) ut quartum hunc librum ederem & me movit, & necessitatem quandam attulit. In quo quicquid continetur ipsius totum ac proprium est, viz. suavissimi lectissimique coronæ flores: nam & re vera sunt & appellantur leges Angliæ, jura coronæ aut jura regia, quia ut inquit, Bracton lib. 1. cap. 8. Ipse autem Rex non debet esse sub homine, sed sub Deo & lege, quia lex facit Regem: attribuat igitur Rex legi, quod lex attribuit ei, viz. dominationem & imperium. Non est enim rex ubi dominatur voluntas & non lex. Et in registro verba rescripti (cui titulus ad jura regia) sunt: Rex, &c. salutem: ad jura nostræ regie, ne depereant, seu per aliquorum usurpationes indebitas aliquantulum subtrahantur, quatenus

tenus julte poterimus manu-
tenenda, subtrahæque & oc-
cupata si que fuerint ad sta-
tum debitum revocanda, nec
non ad impugnatores eorun-
dem jurium nostrorum re-
frænandos, & prout conve-
nit juxta eorum demerita
puniendos, eo studiosius nos
debet operam adhibere, &
solicitiùs extendere manum
nostram, quo ad hoc vincu-
lo jurementi teneri dignosci-
mur & astringi, pluresque
conspicim' indies jura illa
pro viribus impugnare, &c.
Et rursus, Rex, &c. salu-
tem: ad conservationem ju-
rium coronæ nostræ, eo nos
debet studiosius operam ad-
hibere, quo ad hoc astringi-
mur vinculo sacramenti, &
alios conspicimus ad ipsorum
jurium enervationem ampli-
us anbelare, &c. denique
concludit, Et sciatis quod si
secus facere præsumpseritis,
ad vos tanquam violatores
regii juris nostri non im-
meritò graviter capiemus.
Ex quibus antiquis rescrip-
tis constat. 1. Quam ca-
pitale flagitium semper
habitum est, leges hæc
quæ Imperiales sunt &
Coronæ jus respiciunt, im-
pugnare aut calumniari.
2. Quod in omnibus ferè
sæculis leges istæ multos
habuerunt qui eis obfi-
sterent intercederentq; vi-
olatores. Denique quam
graviter puniendi sunt,

menti, & alios conspici-
mus ad ipsorum jurium
enervationem amplius an-
belare, &c. concluding thus,
et sciatis quod si secus fa-
cere præsumpseritis, ad vos
tanquam violatores regii
juris nostri non immeritò
graviter capiemus, which
is, we ought the more ear-
nestly to provide for the
conservation of the laws
and rights of our crown, as
being thereunto tied by the
bond of an oath; and for
that we see others the more
greedily to gape after the
weakening and subverting of
those said laws, &c. con-
cluding thus; And know ye,
that if ye shall presume other-
wise to do, we shall with
grief not undeservedly hold
you as violators of our king-
ly rights and laws. By
which ancient writs appear-
eth. 1. What an exorbi-
tant offence it hath been
ever deemed to impugn or
calumniate these laws, be-
ing the imperial laws of the
crown. 2. That in all ages,
these laws have had many
that sought impugn and
violate them: and last-
ly, how grievously such as so
presumed to offend, should
be punished; nam & fru-
stra feruntur leges nisi
severè puniantur contempto-
res; and it is truly said, that
non debet princeps ferre
legum

legum suarum ludibrium: and woful experience hath often taught, (which I myself have sometimes observed) that many of those men that have strained their wits, and stretched their tongues to scandalize or calumniate these laws, had either practised or plotted some heinous crime, and therefore hated, because they feared the just sentence and heavy stroke. The reading of the several reports and records of these laws, doth not only yield immense profit, as elsewhere I have noted, but doth contain the faithful and true histories of all successive times, as well concerning the punishment of the evil for their heinous, horrible, and exorbitant offences, as concerning the reward and advancement of men of great merit and virtue for their high and honourable service in the commonwealth: and (which is above all) they are memorials to all posterity of the valourous piety, virtues, and victories of the Kings and Princes of this realm. The first appeareth most evidently amongst other things by the creations and erections of men of great desert to eminent places, and degrees of nobility and honour, of such estates, and in such manner

qui peccare in hoc genere præsumpserint: nam & frustra fuerunt leges nisi severe puniantur contemptores, & verissime dicitur; quod non debet princeps ferre legum suar' ludibrium. Quin & sepius docuit misera ac luctuosa experientia (qd' aliquando ipse etiam observavi) multos qui in id ingenii nervos omnes intenderunt, linguasq; exacuer', ut legib' huiusce scandalum aut calumniam imposerent, nefarium aliqd' crimen aut commisisse, aut fuisse machinatos; ideoque leges odisse, quia justam censuram & gravem plagam metuer'. Lectio istar' legum ut referuntur ac mandantur literis, non solum utilitatem summam affert (sicut alias attigi) verum fidelem etiam certamque historiam omnium superior' tempor' completitur, tam respectu præmii atq; provection' bonor' optimeq; meritor' viror' propt' egregiam atque honorabilem operam reipub. datam; quam pænæ malorum propt' nefaria atrocita ac immania flagitia: deniq; (quod caput est) libri isti memoriales sunt ac monumenta ad omnem posteritatem pietatis, virtutum, fortitudinis, atq; victoriarum reg' ac principum huius imperii: atq;
pi-

primum quidem clarissimè patet cum alijs, tam præcipuè ex eo, qd' viri optimè meriti ad excelsa atque illustra loca, nec non ad nobilitatis & honoris gradus evehi sunt, tantum ordine modo ac forma a legib' hujus regni præscript' & constitutis. 2. Etiam constat ex formulis convincendi atque prosequendi capitulum aliorumque criminum reos: tertium, ex multis præclarissimis scriptis ac monumentis fidelissimis illis sanè & perpetuis testibus dignisque adeò que divulgantur omnibusque innotescant: ad quam rem, (ne extra terminos ac fines, suos egrediatur præfatio) unum in hoc tempore exemplum ejus generis chartæ sive donationis accipite, factum quidem ab Edgardo Rege Angliæ, inde vero scripto traditum, ac vel in hunc usq; diem fidelissimè asservatum.

*" Altitonantis Dei lar-
" gisflua clementia, qui
" est Rex regum, &
" Dominus Dominanti-
" um, ego Edgarus Ang-
" lor' Basileus, omnium-
" que regum insular'
" oceani quæ Britan-
" niam circumjacent,
" cunctarumque Nati-
" onum quæ infra eam
" includuntur Impera-*

and form, as are warranted by the laws of the realm. The second by the records of the attainders in judicial proceedings against capital and other offenders. And the third by many excellent records, the most faithful and perpetual witnesses, and worthy to be published, and made known to all; and therefore at this time, lest my preface should exceed his proper model of that sort; take one example of a charter made by Edgar King of England, and recorded, and thereby faithfully continued to this day.

*" Altitonantis Dei lar-
" gisflua clementia, qui est
" Rex Regum, & Domi-
" nus Dominantium: ego
" Edgarus Anglorum Ba-
" sileus, omniumque regum,
" insularum oceani quæ
" Britanniam circumjacent,
" cunctarumque Nationum
" quæ infra eam includun-
" tur*

“ *tur imperator & Domi-*
 “ *nus: gratias ago ipsi*
 “ *Deo omnipotenti Regi*
 “ *meo, qui meum impe-*
 “ *rium sic ampliavit &*
 “ *exaltavit super regnum*
 “ *patrum meorum. Qui*
 “ *licet Monarchiam totius*
 “ *Angliæ adepti sunt a*
 “ *tempore Athelstani, qui*
 “ *primus Reg’ Angl’ om-*
 “ *nes nationes quæ Bri-*
 “ *tanniam incolunt sibi*
 “ *armis subegit, nullus ta-*
 “ *men eor’ ultra fines im-*
 “ *perium suum dilatare ag-*
 “ *gressus est, mihi tamen*
 “ *concessit propitia divini-*
 “ *tas cum Anglor’ imperio,*
 “ *omnia regna insularum*
 “ *oceanum cum suis ferocif-*
 “ *simis Regibus usq; Nor-*
 “ *vegiam, maximamque*
 “ *partem Hiberniæ, cum*
 “ *sua nobilissima civitate*
 “ *de Dublinæ, Anglorum*
 “ *regno subjugare; quos*
 “ *etiam omnes meis impe-*
 “ *riis, colla subdare Dei*
 “ *favente gratia coegit.*
 “ *Quapropter & ego Chri-*
 “ *sti gloriam & laudem in*
 “ *regno meo exaltare, &*
 “ *ejus servitium amplifi-*
 “ *care devotus disposui:*
 “ *et per meos fideles fau-*
 “ *tores Dunstanum, viz.*
 “ *Archiepisc’, Ayelyolan’,*
 “ *ac Oswaldum Archie-*
 “ *piscopos, quos mihi pa-*
 “ *tres spirituales & confi-*
 “ *liatores elegi, magna ex*

“ *tor & Dominus: Gratias*
 “ *ago ipsi Deo omnipotenti*
 “ *Regi meo, qui meum im-*
 “ *perium sic ampliavit &*
 “ *exaltavit super regnum*
 “ *patrum meorum. Quilicet*
 “ *monarchiam totius Ang-*
 “ *liæ adepti sunt, a tempore*
 “ *Athelstani qui primus Re-*
 “ *gum Anglorum omnes*
 “ *nationes quæ Britanniam*
 “ *incolunt sibi armis subegit,*
 “ *nullus tamen eorum ultra*
 “ *fines imperium suum dila-*
 “ *tare agressus est; mihi ta-*
 “ *men concessit propitia di-*
 “ *vinitas cum Anglorum im-*
 “ *perio, omnia regna insula-*
 “ *rum oceanum cum suis fero-*
 “ *cissimis Regibus usque*
 “ *Norvegiam, maximamque*
 “ *partem Hiberniæ, cum*
 “ *sua nobilissima civit’ de*
 “ *Dublina, Anglorum regni*
 “ *subjugare: quos etiam om-*
 “ *nes meis imperiis colla*
 “ *subdare Dei favente gratia*
 “ *coegi. Quapropter & ego*
 “ *Christi gloriam & laudem*
 “ *in Regno meo exaltare, &*
 “ *ejus servitium amplifi-*
 “ *care devotus disposui:*
 “ *et per meos fideles fau-*
 “ *tores Dunstanum: viz.*
 “ *Archiepiscopum, Ayelyo-*
 “ *lanum ac Oswaldum Epif-*
 “ *copos, quos mihi pa-*
 “ *tres spirituales & confi-*
 “ *liatores elegi, magna ex*
 “ *parte disposui, &c. Facta*
 “ *sunt hæc Anno Domini*
 “ *964. Indictione 8 Regni*
 “ *vero*

“ vero Edgari Anglorum
 “ Regis 6. in regia urbe
 “ quæ ab incolis Ocleayecca-
 “ striæ nominatur, in Na-
 “ tale domini festiuitate,
 “ sanctorum innocentium fe-
 “ ria 4, &c. + Ego Ed-
 “ gar Basileus Anglorum
 “ & Imperator Regum gen-
 “ tium cum consensu &
 “ Principum & Archiep-
 “ meorum hanc meam muni-
 “ ficentiam signo crucis cor-
 “ roboro + Ego Alfrie Re-
 “ gina consensi & signo cru-
 “ cis confirmavi. + Ego
 “ Dunstan Archiepiscopus
 “ Dorobor. Ecclesiæ Christi
 “ consensi & subscripsi. +
 “ Ego Osticel Archiep- Ebo-
 “ racensis Eccl’ consensi &
 “ subscripsi. + Ego Alferic
 “ Dux. Ego Bruthnod
 “ Dux. Ego Aridgari Dux.
 + Ubi hæc observanda:
 1. Ejus in Deum pietas ac
 devotio, quæ beatitudinis
 omnis fons est & summum
 bonum. 2. Imperii ejus
 amplitudo & Hiberniæ pri-
 ma subjugatio, diu ante
 tempora Regis Hen. 2.

Ut ergo concludam, il-
 lud a docto lectore peto,
 vel ut corrigat sicubi erra-
 tum invenirit, vel sal-
 VOL. II.

“ parte disposui, &c. Fa-
 “ Sta sunt hæc anno Dom-
 “ 964. Inditione 8. Reg-
 “ ni vero Edgari Anglor-
 “ Reg’ 6. in regia urbe quæ
 “ ab incolis Ocleayeccastriæ
 “ nominatur in natale Dom-
 “ festiuitate, sanctorum In-
 “ nocentium feria 4, &c.
 “ + Ego Edgar Basileus
 “ Anglorum & Imperator
 “ Regum gentium cum con-
 “ sensu & Principum &
 “ Archiepiscoporum meor-
 “ hanc meam munificentiam
 “ sig’ crucis corroboro. + Ego
 “ Alfrie Regina consensi
 “ & signo crucis confir-
 “ mavi. + Ego Dunstan.
 “ Archiepiscop’ Dorobor.
 “ Ecclesiæ Christi consensi
 “ & subscripsi. + Ego O-
 “ sticel Archiepisc. Ebo-
 “ racensis Eccl’ consensi
 “ & subscripsi. + Ego
 “ Alferic Dux. Ego Bruth-
 “ nod Dux. Ego Adrigari
 “ Dux. + Whereby is to
 be observed, first his piety
 and devotion towards God
 the fountain of all happi-
 ness, the true summum bo-
 num. Secondly, the large-
 ness of his empire, and the
 first conquest of Ireland,
 long before the reign of K.
 Hen. the Second.

To conclude, of the learn-
 ed reader, my desire is, that
 he would either amend that
 which herein he shall find
 O amiss,

amiss, or at least that he will not find fault with any part, until he hath seriously read over the whole, and then, it may be, he will reprehend the less: and altho' herein I have taken all the labour; yet I unfeignedly wish to all the readers, all, or at the least, equal profit.

tem ne partem aliquam reprehendat, donec totum studiosè perlegerit, unde fortè fiet ut pauciora criminetur: et utcunque labor iste totus sit meus: lectoribus tamen singulis, idque ex animo omnem, aut saltem parem mecum fructum exopto.

Plura quidem feci, quam quæ comprehendere diētis

In promptu mihi sit; rerum tamen ordine ducar.

Plura quidem feci, quam quæ comprehendere diētis

In promptu mihi sit; rerum tamen ordine ducar.

Interea lector valeas, & memineris quod quicunque genuinum sensum ac vim alicujus legis commento aut technâ illuserit, legis violator habendus est.

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BENE VALE.

V E R N O N's Case.

Mich. 14 & 15 Eliz.

IN a writ of dower brought by Mary Vernon against John Vernon, Esq. of the manor of Sudbury in the county of Derby: the tenant pleaded, that her husband was also seised of certain lands in the same county in his demesne as of fee, and by deed indented, thereof enfeoffed Sir Thomas Gifford, Knight and others and their heirs, to the use of himself for the term of his life, without impeachment of waste, and after his decease, to the use of the demandant then his wife, for the term of her life: and after her decease to the use of the right heirs of the husband; and averred, that the said estate for life so limited to the said demandant, was for her jointure, and in full satisfaction of her dower, and that after the death of her husband, the demandant entered into the said land so limited to her for her jointure, and agreed to it: to which the demandant replied, and confessed the said feoffment, and the limitation of the uses, *scil.* to the use of the husband for his life, without impeachment of waste, and afterwards to the use of the demandant, for her life; but further said, that the limitation to the wife for life, was upon condition that she should perform the last will of her husband; and shewed all the will in certain, in which, divers things were to be performed by the demandant, and demanded judgment if the tenant should be admitted, and received to aver that this estate so limited to the wife upon the said condition, was for the jointure of the wife, and in satisfaction of her dower; upon which matter the tenant demurred in law: and in this case five points were resolved.

1. That by the rule of the common law, a right or title which any one has to any lands or tenem. of any estate of inheritance or freehold, can't be barred by acceptance of any manner of

O 2

(a) collateral

Dyer 317. pl. 7.
N. Bendl. 210.
pl. 247.

(a) Co. Lit. 36.
b. 9 Co. 97. b.
1 Rol. Rep. 297.
1st Point.
Doct. pla. 17.
2 Brownl. 132.
Dyer 91. pl. 12.

- (a) Doct. pla. 17. (a) collateral satisfaction or recompence : as if A. disseises B. tenant for life or in fee, of the manor of Dale, and afterwards gives the manor of Dale to B. and his heirs, in full satisfaction of all his rights and actions which he has in or for the manor of Dale, which B. accepts, yet B. may enter into the manor of Dale, or recover it in any real action : for a right or title of (b) freehold or inheritance cannot be barred by any collateral satisfaction, but by release or confirmation, or an act which *tautamounts*, and therefore it is commonly said in our books, that (c) accord with satisfaction is a good plea in personal actions, where damages are only to be recovered, and not in real actions : *vide* 13 H. 7. 13, 20, &c. And what was the reason that no collateral satisfaction or recompence made to the wife in satisfaction of her dower, was any bar of her dower by the common law : but dower *ad ostium ecclesiæ*, or *ex assensu patris* concluded her of her dower, (d) if she entered into the land so assigned, after the death of her husband ; for the law allows them, being made in such form as the law requires, to be dowers in law. But if a man in consideration of a marriage afterwards to be had with A. makes an estate of certain lands to her for her life, in full satisfaction of all the dower which after marriage may accrue to her in any of his lands, and afterwards they intermarry, that was no (e) bar of her dower at the common law for two reasons ; one, because she had no title of dower at the time of the acceptance of the satisfaction, but it accrued after : secondly, because no (f) collateral satisfaction can bar any right or title of any inheritance or freehold, as hath been said, and thereby the doubt in 29 E. 3. 3. is well resolved. So if the husband purchases or causes an estate to be made to him and his wife for life, or in tail, in full satisfaction of her dower, and dies, *that* was no bar of her dower at the common law, *causa qua supra* : so if after the death of the husband the heir makes an estate to the wife for life of any land (g) (whereof she is not dowable) in full satisfaction of her dower, that is no bar of her dower : *vide* the case now in the reports of the Lord Dyer, (b) 1 Mar. 91. acc. & *vide* (i) 31 E. 3. *Scire facias* 99. Before the making of the statute of 27 H. 8. cap. 10. the greatest part of the land in England was conveyed to sundry persons to uses, and forasmuch as a wife was not dowable of (k) uses, her father or friends upon her marriage procured the husband to take an estate from his feoffees, or others seised to his use, to him and to his wife before or after marriage, for their lives, or in tail, for a competent provision for the wife after the husband's death : then comes the statute of 27 Hen. 8. which transfers the possession and estate of the lands

(b) Co. Lit. 36. b.
9 Co. 79. b.
1 Rol. Rep. 297.
2 Brown 232.
Dy. 91. pl. 12.
(c) 6 Co. 43. b.
44. a.
13 H. 7. 13, 20.
Cro. El. 357.
Cro. Jac. 100.

(d) Co. Lio. 36.
a. b.
Lit. Sect. 43.

(e) Co. Lit. 36. b.

(f) Co. Lit. 36.
b. *supra*.

(g) Co. Lit. 36. b.

(b) 1 Mar. Dyer
91. p. 12, 13.
31 E. 3. Sci. fac.
(i) Co. Lit. 36. b.
Perk. sect. 410.
Dyer 91. pl. 13.
(k) Dyer 266.
pl. 7.

to the use, by which the husbands were seised accordingly; and by consequence, if further provision had not been made, the wives would have as well their dowers as their jointures for the reasons aforesaid; and for this reason the branches concerning jointures were added to the said statute of 27 H. 8. And therefore it was resolved, that if this estate in the case at bar limited to the wife, was not within the said act of 27 H. 8. that by the common law it was no bar of the demandant's dower, but that she should have both.

Secondly, it was resolved, that if a man makes a seoffment to the use of himself for life, (a) and afterwards to the use of his wife for her life, for the jointure of his wife, that such estate in remainder is within the intent of the said act of 27 H. 8. For although the statute expresses particularly these five forms, 1. To the husband and wife, and to the heirs of the husband; 2. To the husband and wife, and to the heirs of their two bodies; 3. To the husband and wife, and to the heirs of the body of one of them; 4. To the husband and his wife for their lives; 5. To the husband and wife for the life of the wife; and yet many other estates not there expressed are within this act, for the said particular forms are put but for (b) examples, and not to exclude any other estate, which is to such effect, and agrees with the intent of the makers of the act; and although it was objected, that all the examples expressed in the act are of a joint estate made to the husband and wife, and none of them to the wife only, nor by way of remainder; although by a proviso in the same act, it is provided, "That if any wife shall have any manors, lands, &c. unto her assured after marriage, for term of her life, or otherwise, in jointure, &c." so as the letter of the act imports a joint estate, and that this word *junctura* implies a joint estate, and that the dowers of women are much favoured in law; yet it was resolved, that all is of one effect as to the wife, to limit an estate to the husband and wife for their lives (c) and to the husband for his life, the remainder to the wife for her life; for the one estate is as beneficial to the wife as the other; *vide* after the case of (d) Ashton as to this point. But it was resolved, that the estate which by force of this act shall be in lieu and bar of her dower, ought by the limitat. thereof to take effect (e) immediately after the husband's death, for it plainly appears by all the examples expressed in the said act, *sc.* that the estates of the wives shall take effect immediately after the death of their husbands; and therefore (f) no other estate not expressed in the act shall be taken by the equity of the act, unless it has the same beginning for the benefit of the wives,

Reason why the clause of jointures was added to the stat. 27. H. 8. c. 10.

2d Point.

(a) Dyer 340. pl. 50.

(b) Lit. sect. 21. Co. Lit. 24. a. Cro. Car. 533. 2 Inst. 311, 334 Godb. 78, 79. Yelv. 176.

(c) Dyer 340. pl. 50.

(d) Postea 2. b.

(e) Co. Lit. 36. b.

(f) Hob. 40.

(a) Winch 33.
Hutt. 51. Hutt.
Argument 49.
Cro. Jac. 489.
Cawly 213. 214.
Co. Lit. 36. b.
Moor 903.
1 Sid. 3. 4.
(b) Hob. 151.
Winch. 33.
Hutt. 51.

(c) Hutt. 51.
Cawly 214.
2 Co. 55. b.
4 Co. 90. a.
8 Co. 135. b.
10 Co. 62. a.
Cro. El. 585.
Co. Lit. 35.
Dav. 32. a.
2 Bulst 304. 305.
3 Bulst. 192.
(d) 3 Bulst. 43,
192.
10 Co. 62. a.
11 Co. 78. a.
(e) Co. Lit. 36. b.

(f) Dyer 96. pl.
42, 97. pl. 48, 49.
The Dutcheſſe of
Somerset's caſe.
1 Mariae, Dyer 96.

(g) Antea 1. a.
Moor 28. 29.
Aſhton's caſe.
Mich. 6 & 7
Eliz. Dy. 228.
pl. 46, 47.

3d Point.

(h) 1 Leon. 311.
Dyer 317. pl. 7.
Cr. El. 451, 452,
Poſtea 3. a.
Moor 31.

(i) Co. Lit. 36. b.
Poſtea 3. a.

as the examples purport : and therefore if the husband makes a feoffment in fee to the use of himself for life, (a) and afterwards to the use of B. for his life, and afterwards to the use of his wife for life, for her jointure, it is not within the act, although B. dies, living the husband ; so if the husband makes a feoffment in fee to the use of A. for his life (b) and afterwards to the use of his wife for her life, for her jointure, it is not within the act, although A dies, living the husband. For in these, and other like cases, so far as at the time of the limitation of the estates they were out of the act, because it was not certain that the estate of the wife would take effect immediately by the death of the husband as it ought by the act, no subsequent event can make them within the act. For (c) *quod ab initio non valet, in tractu temporis non convalescet* ; & (d) *quæ malo sunt inchoata principio, vix est ut bono peragantur exitu* : and therefore in all the said and the like cases, although the wife attains to them, and enters and takes the profits, yet she shall have the dower of the residue. For if the said act doth not bar her, (e) the common law, as has been said before, will not conclude her in such case of her dower. And the Lord Dyer said, that it was adjudged in Q. Mary's time, that where the Duke of Somerset purchased lands to him and to the Duchess his wife, and to the heirs males of their two bodies, that although it was not any of the estates put for example in the said act, yet it was adjudged, that it was within the intent of it, which case you may see in the Lord Dyer's Rep. 1 Ma. 96. (f) Also the Lord Dyer said that it was resolved in the time of Q. Eliz. that where one Ashton, in performance of covenants of a marriage to be had between his son and one A. made a feoffment to the use of A for her life, for her jointure, and afterwards they intermarried, and the husband died, it was a jointure within the intent of the act, and yet all the five examples are of estates made to the husband and wife : but in the said case of Ashton, the said estate was made before (g) marriage, so that there was not any husband or wife at the time of the making of the estate ; also the estate was only to the woman, where all the examples are of a joint estate, but all is of one effect, which case you may see M. 6 & 7 Eliz. Dyer. 228.

Thirdly, it was resolved, that although the estate limited to the wife was upon condition, and although dower (in lieu of which the jointure comes) at the common law was an absolute estate for life, yet so far as an estate for life upon condition, is an estate for life, it was within the words and the intent of the act, if the wife after the death of her husband accepts it ; for it was agreed that a jointure is a (i) competent livelihood of freehold for the wife, to take effect immediately after the death of the husband, for the life of the wife, if she herself is not the cause of the determination or forfeiture of it ; and therefore if the husband makes

makes a feoffment in fee to the use of his wife, (a) for another's life, for her jointure, it is not within the act, for the estate is not for the wife's life, and it may determine without her act or default, during her life, and thereby she will be destitute of a livelihood: but if a man makes a feoffment in fee to the use of himself for his life, and after to the use of his wife (b) *durante viduitate sua* for her jointure, that is an estate for her life, and it cannot determine without her own act, and therefore it is a jointure within the said act. The same law of an estate made to the wife for her life, upon (c) condition, for if she does not break the condition, it is an estate to her for her life. And in the case at the bar, if the condition binds her to any unreasonable thing, she might have waved it, but when she, after the death of her husband, enters and accepts the conditional estate for her jointure, she is barred of her dower.

Fourthly, it was resolved, that if a jointure is made to a woman (d) before marriage, after the husband's death, the wife cannot wave it, and take her dower, as she may of a jointure made to her during the marriage, and that by force of the said proviso, the effect of which is, that if any woman hath any manors, lands, tenements or hereditaments assured to her (e) after marriage for term of her life, or otherwise in jointure, &c. that she after the death of her husband, shall have liberty to refuse it; by which they resolved, that if the jointure was made before marriage, that the intent of the makers of the act was, that she should not refuse, but should take such jointure as was made to her. "Vide the case of Ashton put before as to this purpose." And it was said, if lands are conveyed to a woman before (f) marriage, for part of her jointure, and after marriage more land is conveyed to her for her full jointure, and in satisfaction of her whole dower, and afterward the husband dies, in that case if the wife waves the land conveyed to her use after her marriage, she shall have the land conveyed to her before the marriage, and her dower also in the residue; for land conveyed to a woman (g) in part of her jointure, or in satisfaction of part of her dower, is no bar (for the uncertainty) of any part of her dower. As if the debtor gives the creditor an horse, or any other thing in satisfaction (h) of part of his debt, it shall be a bar for no part for the uncertainty. Also the words of the act are, for the jointure of wives and not for part of their jointures.

Fifthly, it was resolved, that although in the case at bar, the estate of the wife was upon express condition to perform his will, which imports a consideration of the making of the estate, yet it may be (i) averred to be for the jointure of his wife, for the one consideration stands well with the other; and although it is not expressed in the deed, yet it may be averred, as the L. Dyer said it was adjudged in the like

(a) Hob. 40, 153.

(b) Dy. 317. pl. 7. Moor 31. Poſtea 30. a.

(c) Antea 2. b. 1 Leon. 311. Dyer 317. pl. 7. Cro. El. 451, 452. Moor 31.

4th Point. (d) Co. Lit. 36. b. Plowd. 399. b.

(e) Co. Lit. 36. b. 3 Co. 27. a. 28. a. b. Plowd. 396. b. Dyer 61. pl. 31. B. N. C. 421. Goldſb. 84, 85.

(f) Co. Lit. 36. b. Cawly 214.

(g) Co. Lit. 36. b.

(h) Doct. pl. 25.

5th Point.

(i) Owen. 33. 9 Co. 26. a. b. 2 And. 46, 47.]

(a) Moor 495.
505.
1 Co. 176. a.
B. N. C. 182.
N. Bend. 39.
2 Roll 781.
2 Inst. 672.
Owen. 33.
Raym. 47, 50.
Bendl. in Kew.
208.
3 Co. 51. a.
7 Co. 39. a.
11 Co. 25. a.
Cart. 140.
Palm. 214, 215.
505, 507.
2 Rol. Rep. 68.
(b) Dy. 317. pl. 7.
B. N. C. 421.
Dyer 248. pl. 78.
(c) Bridgm. 136.
Co. Lit. 326. b.
10 Co. 37. a.
(d) Co. Lit.
sect. 360.
Co. Lit. 223. a.
206. b.
8 H. 7. 10. b.
21 E. 4. 47. a.
Doct. and Stud.
39, 123.
6 Co. 41. b.
Br. Con. 82, 135.
13 H. 7. 23. a.
21 H. 7. 8. a.
Br. Prereg. 102.
21 H. 7. 11. a.
Plowd. 77. a.
21 H. 6. 33. b.
5 Co. 56. a.
Hob. 170.
(e) Co. Lit. 36. b.
Antea a. b.
(f) Dyer 248.
pl. 78.

case between Villers (a) and Beaumont, in the time of Q. Mary, which you may now see in his Rep. 4 & 5 P. & M. 146. And in the case at bar the case is stronger, because the averment is given by the said act of 27 H. 8. by the words in the act, for the jointure of the wife; and in this case the Lord Dyer said that the case of 6 E. 6. (b) Br. Dower 69. was misreported; for true it is, that it was resolved, that an estate in fee-simple conveyed to the wife, was no jointure within the statute, but that is to be intended within the statute of (c) 11 H. 7. 20. which restrains the alienation of women, which act neither in the letter nor in the meaning can be intended when a woman has an estate in fee-simple; for to restrain (d) such estate that it shall not be aliened, is repugnant and against the rule of the com. law, and utterly out of the letter and intention of the act: but he said, that an estate in fee-simple conveyed to a woman for her jointure, and in satisfaction of her dower, is a jointure within the equity of the said act of 27 H. 8. for that is a (e) competent livelihood to the wife of an estate of freehold, to take effect immediately after the death of the husband for all the wife's life and more: and the Lord Dyer said, it was so resolved in Sir Morris Dennis's Case, which case is now reported 8 Eliz Dyer (f) 248. And he said, that the reason reported by Brook, that a fee-simple is no jointure within the said act of 27 H. 8. is because such jointure is not mentioned in the statute; but that is no reason in law for three reasons. 1. Because the principal case at bar, and divers other cases put before, were out of the words of the act, and yet were within the equity and intent of the act. 2. It agrees with the description of a jointure agreed and resolved before. 3. He said, this estate in fee-simple was within the express letter of the act, for the words of the said proviso are; "for term of life, or otherwise in jointure," which word (otherwise) extends to all other estates conveyed to the wife not mentioned before in the act, which are as, or more, beneficial to the wife than the estates beforementioned, for all other estates which are as beneficial to the wife, or more, as the estates mentioned in the act, are within this word (otherwise) For *nota*, this word (otherwise) is not indefinite, but otherwise in jointure; *id est* for a jointure which is as much as to say, otherwise, having all the effect of the incidents to a jointure implied in the said five examples, or more: and if an estate for life, in tail, or fee simple is conveyed to the wife for her jointure, and after the death of the husband she is evicted, she shall recover her dower to the value in the residue, and shall have but an estate for life, of what estate soever her jointure is by an express proviso in the said act of 27 H. 8. So that upon eviction no greater prejudice shall accrue to the terre-tenant, if the jointure is of any estate of inheritance, than if it was but only for

for term of her life. And afterwards judgment in the principal case was given against the demandant. Note reader, in the said case reported by the Lord Brook, it is further said, that a devise (a) of land by the husband to the wife by will, is no bar of her dower, for it is a (b) benevolence, and not a jointure, *per Justiciari* as it is there reported; and that is good law, if it is well understood. And as to *that*, some have said, that no estate devised by will can be a jointure within 27 H. 8. for two reasons. 1. That by the said act of 27 H. 8. the whole estate of the feoffees was transferred to *cestui que use*, and *per consequens* no land after the making of that act was deviseable till the statute of 32 H. 8. and therefore a devise of land, which then by the law could not be made, cannot be within the said act of 27 H. 8. The other reason was, because every jointure intended within the act of 27 H. 8. is made and assured either before, or during the coverture, as appears by the said act, but a devise takes its effect after the husband's death: but that neither of these is any reason in law, appears by the resolution following, Mich. 38 & 39 Eliz. between Leak and Randall in the Court of Wards, it was resolved by the two Chief Justices, & *tot' cur'* that if a man devises land to his wife for term of her life (c) generally, it cannot be averred to be for the jointure of the wife, and in satisfaction of her dower, for two reasons. 1. Because a devise implies a consideration in itself, and therefore as a devise cannot be averred to be to the use of another than of the devisee, unless it is expressed in the will, no more can a devise be averred to be for a jointure, unless it is so expressed in the will. But as it is said in the said case of 6 E. 6. it shall be taken for a benevolence, and so is the said case of 6 E. 6. to be intended. 2. The whole will concerning lands by the statutes of 32 & 34 H. 8. ought to be in writing, and no averment ought to be taken out of (d) the will, which cannot be collected by the words contained in the will. But if a man devises land to a woman for term of her life, or in tail, &c. for her jointure, and in satisfaction of her dower, it was resolved that it is a jointure within the act of 27 H. 8. for as an estate for life made to a woman for her jointure before marriage, when she is not his wife, is within the equity of the said act, so an estate for life, devised to a woman for her life, which takes effect after his death, when the marriage is dissolved, is also within the equity of the said act, for such estate well agrees with the intent of the makers of the said act of 27 H. 8. and with the said description of a jointure made by the Justices in the said case of Vernon. And altho' land was not deviseable until 32 H. 8. yet it is frequent in our books, that an act made of (e) late time shall be taken within the equity of an act made long time before. As the

statute

(a) Moor 31.

(b) B. N. C. 421.
Dyer 248. pl. 78.
Postea 4. 2.Mich. 38 & 39
Eliz. inter Leak
and Randall, in
Curia Warco-
rum.(c) Co. Lit. 36. b.
Winch. 100.
Cawly 214.(d) 5 Co. 68. a.
Latch. 42. Jenk.
Cent. 115. Cro.
Eliz. 498.
Moor 222.
2 Bulst. 177, 178.
Bridg. 135.
Godb. 432.
Lit. Rep. 188.
Hutt. Arg. 49, 50.
Raym. 410, 411.
2 Leon. 70.(e) Plowd. 127. a.
82 b. 2 Inst 35.
322. Godb. 79.
2 Brownl. 115.
Cro. Eliz. 177.
1 Jones 188, 381.

(a) 12 H. 7.
19, 20.

(b) Plowd. 127. a.
178. b. 8 Co. 52. b.
Co. Lit. 365. a.
Plowd. 100. a.

(c) Fitz. Adjor. 3.
Br. Adjor. 3.

(d) Co. Lit. 144. a.
2 Inst. 82, 83.
F. N. B. 188. b.

(e) Dyer 289,
290. pl. 60.

(f) Antea 4. a.

(g) Dyer 220.
pl. 12.
Hob. 33, 34.

statute of Marlebridge, which was made *anno* 52 H. 3. gave the wardship of the heir of the tenant who held by knight's service, notwithstanding a feoffment made by collusion, at which time, and for 200 years and more after, that is to say, until the stat. of (a) 4 H. 7. c. 17. which gave the wardship of the heir of *cestui que use*, the heir of *cestui que use* was not in ward; and yet it is held in 27 H. 8. 9. a. b. that if *cestui que use* after the statute of (a) 4 H. 7. makes a feoffment in fee by collusion to defraud the lord of his ward, it is taken within the equity of the statute of Marlebridge. Also the statute *de Donis Conditionalibus* made 13 E. 1. as to the warranty of tenant in tail with assents is taken within the (b) equity of the stat. of Gloucester, cap. 3. made *anno* 6 E. 1. as it is held in 11 E. 2. garr. Stath. & (38) 43 E. 3. 23. b. For *Formedon in Descender* was given in lieu of a Mortdancester. So that the statute of West. 2. cap. 25. made 13 E. 1. gave a certificate, but gave no adjournment, but (c) adjournment is taken by equity of the stat. of *Magna Charta*, cap. 13. made 9 H. 3. as it is held 12 H. 4. 9. b. So the statute of 7 R. 2. gave assise in *confinio Comitatus*; and (d) *Redisseisin* taken by equity of the statute of Merton, c. 3. made 20 H. 3. *vide* 1 E. 3. 25. b. & 12 Eliz. Dyer 289. The Bishop (e) of London being one of the High Commissioners, by force of the act of 1 Reg. Eliz. was translated to the Archbishoprick of York, yet his authority remained by force of the act made *anno* 1 E. 6. cap. 7. and with this resolution (f) in Leak's case aforesaid, agrees the case reported by the Lord Dyer, 5 Reg' Eliz. 220. (g) A man seised of certain land in fee, held in socage, and of other land in tail held *in capite*, devised by his will in writing the third part of all his lands to his wife in recompence of her dower, and died; the wife entered into the third part of the land in fee-simple; and it was resolved, that it should be a bar of her dower by the said act of 27 H. 8. *in curia wardorum*. Note reader, a good difference, and all the opinions, which seem to disagree, well reconciled,

Know reader, that by subtil and sinister counsel, an evasion out of the said act of 27 H. 8. (as was intended) was devised, how women might have jointures and dowers also notwithstanding the said act, and the invention was such: one Christian, who was the wife of one Richard Melles of the county of Suffolk, had a jointure made of an house and certain land in Stoke Naylond in the county of Suffolk, to her husband and her, and to the heirs of the body of the husband, by one John Melles, uncle of the said Richard; which Richard was seised in fee of divers other lands in the same town, and afterwards Richard died; the wife with certain of her friends of her confederacy, in a secret manner entered into the said tenements conveyed to her, and claimed them for her jointure and yet waived the possession, and brought a writ of dower

dower to be endowed of the whole, as well of *that* which was assigned to her for her jointure as of the residue of her husband's lands and tenements, and had a full third part of the whole (accounting the land conveyed to her for her jointure to be parcel) assigned to her by the Sheriff for her dower (not knowing the practice) only out of the said residue: and when she had her dower, then she openly entered into the said house and land conveyed to her for her jointure, which was held out by Tho. Purflow, the terre-tenant, and afterwards she married one John Sharp, who brought an action of trespass against the said Tho. Purflow, for a trespass done 10 June, *anno* 18 Eliz. in the house and land conveyed in jointure. And Purflow, by the advice of one of the Inner-Temple pleaded the feoffment of the said Richard to him and justified. To which the plaintiffs replied, that before Richard had any thing, the said John was seised, and gave to her and her husband *ut supra*. To which the defendant rejoined, that the estate made to Richard and Christian, was for the jointure of Christian, and that after the death of her husband, and before the trespass, she brought a writ of dower against the defendant then tenant of all the land whereof her husband was seised, and demanded the third part of all, recovered, and had execution out of the residue, and averred, that the house and land which was parcel of the land conveyed to her for her jointure, was no part of the land assigned to her for her dower. To which the plaintiffs sur-rejoined, that the said Christian after the death of her husband, and before the writ of dower brought, entered into the said house, claiming it for her jointure. To which the defendant by way of rebutter said, that to say that the said Christian after the death of her husband, and before the writ brought had entered, they should not be admitted against the said record of recovery in the said writ of dower: upon which the plaintiffs demurred in law, and it was argued by the plaintiff's counsel, that first, this bringing of the writ of dower, cannot be any waiver of the estate of the wife, because by the entry of the wife, she has agreed to the said estate, and was actually seised; and therefore she cannot afterwards waive and divest it out of her by the bringing of the said writ of dower. To which it was answered by the defendant's counsel, that admitting the wife could not waive it, yet she might well bar and conclude herself from claiming the said estate, and in this case she had (a) estopped herself to claim any estate in the house and land, in which, &c. For when she brings her writ of dower, and has (b) judgm. to have the third part of the whole, by *that* she affirms, that she has only title of dower, and *per consequens* no estate *ergo* she is estopped to claim any estate in any part of *that* whereof she has demanded by her writ to be endowed; as if the husb. discontinues the wife's land, and dies, and the wife brings a writ of dower against

(a) 1 Roll. 862.

(b) Cr. Eliz. 128.
1 Leon 136, 137,
138. Owen 154.

(a) Owen 154
26 H. 8. 2. a.
F. N. B. 194. b.

(b) 1 Roll. 862.

(c) 4 Co. 41. b.
3 Bulst. 65.

against the discontinuee, and recovers the third part, she is thereby estopped to bring a (a) *cui in vita*, for by her writ of dower she claimed title of dower only, and thereby she shall be estopped to claim any other right by a *cui in vita*: vide 10 E. 3. Double Plea. 8. 20 E. 3. *Scire facias* 13. F. N. B. 194. 17 Aff. 3. Acceptance of dower by deed indented, concludes the wife of her right, vide 11 H. 7. 20. b. So if she had brought her writ of dower to be (b) endowed of the residue only, and had recovered her dower thereof, she should be estopped to claim any estate in the said house and land so conveyed to her although she had entered before; for by the bringing of her writ of dower to be endowed of the residue, she has *tacite* affirmed, that she has not agreed to any jointure made to her; for then she cannot bring any writ of dower by the said act of 27 H. 8. And if the law should be otherwise, great inconvenience would ensue, which by no industry or policy can be prevented, as appears before: and for these reasons it was concluded, that the plaintiffs were in any case concluded from claiming the said house and land which, &c. *Quod fuit concessum per* Sir Christopher Wray, Chief Justice, Sir Thomas Gawdy, & totam Curiam. Nota reader, *Simplicitas est legibus amica*, & (c) *nimia subtilitas in jure reprobatur*.

[See 2 Blackst. Com. ch. 8. fol. 136, 137, 138. how dower may be barred or prevented.]

B E V I L's Case.

4 Co. fo. 6. a.

Mich. 27 & 28 Eliz. Rot. 1739.

In the Common Pleas.

Cornwall ff. **N**ICHOLAS FRANCIS, was attached by the writ of the lady the Queen, of second deliverance, to answer to Walter Parker of a plea, wherefore he took the cattle of him the said Walter, and them unjustly detained against gages and pledges, &c. And whereupon, the said Walter, by Francis Eyrman, his attorney, complaineth, that the aforesaid Nicholas, on the 30th day of October, in the 15th year of the reign of the lady the now Queen, at Tallan, in a certain place called Newton, took the cattle, that is to say, two oxen of him the said Walter, and them unjustly detained against gages and pledges, until, &c. whereupon he saith that he is injured, and hath damage to the value of 20 pounds, and thereof he bringeth suit, &c. And the aforesaid Nicholas, by William Leigh his attorney, cometh and defendeth the force and injury when, &c. And as Bailiff of John Bevil, Esq. doth well acknowledge the taking of the cattle aforesaid, in the afores. place in which, &c. and justly, &c. Because he saith, that the same place called Newton, in which it is supposed the taking of the cattie afores. to be done, doth contain, and at the said time of the taking of the cattle afores. supposed to be done, did contain in itself 20 acres of land with the appurtenances, in Tallan afores. and that long before the afores. time when, &c. one Robert Smith the elder, Esq. was seised of the said 20 acres of land with the appurtenances, in his demesne as of fee, and held the said 20 acres of land with the appurtenances of the afores. John Bevil, as of his manor of Keligath, in the county afores. by knight's service, that is to say, by homage, fealty, and escuage to the lady the Q. when it should happen 42 shillings; and when more, more, and when less, less; and also by the service of doing suit at the court of him the said John, of his manor afores. twice by the year, that is to say, once within one month next after the feast of St. Mich. the Archangel, and again, within one month next after the feast of Easter

Replevin.

See the definition of the writ of second deliverance in Dyer 41. b.

Cognizance.

in

in every year, at that manor holden, of which services, the aforef. John Bevil was seised by the hands of the aforef. Rob. Smith the elder, as by the hands of his very tenant, that is to say, of the homage, fealty, escuage and suit of court, as of fee and right; and that afterwards the aforef. Rob. Smith the elder died seised of the aforef. 20 acres of land with the appurtenances. After whose death, the aforef. 20 acres of land with their appurtenances descended to one Rob. Smith, as son and heir of the aforef. Rob. Smith: by which the said Rob. Smith the son, before the said time when &c. entered into the aforef. 20 acres of land with the appurtenances, and was seised thereof in his demesne as of fee; and because the homage of the aforef. Robert the son at the aforef. time when &c. to the aforef. John Bevil was behind not done, the said Nicholas as Bailiff of the said John Bevil doth well avow the taking of the cattle aforef. in the aforef. place in which &c. and justly &c. for *that* homage so undone, as in the lands of the said John, in form aforef. holden, &c. and upon the aforef. Robert the son, as upon the very tenant of the aforef. John Bevil, and within his fee and lordship, &c. And the aforef. Walter saith, that long before the said time of the taking of the cattle aforef. done, the said Rob. Smith the son was seised of the aforef. 20 acres of land with the appurtenances, in Tallan aforef. called Newton, in his demesne as of fee; and being so seised thereof, before the time of the taking aforef. done, that is to say, on the 24th day of January, in the 13th year of the reign of the said lady the now Queen, at Tallan aforef. (among other things) demised the aforef. 20 acres of land with the appurtenances, to him the said Walter, to have to the said Walter and his assigns, from the aforef. 24th day of January in the year aforef. unto the end of the term of five years from thence next following and fully to be complete and ended: by virtue of which demise, the said Walter entered into the aforef. 20 acres land with the appurtenances, and was, and yet is thereof possessed, the reversion thereof after the term aforef. ended, to the aforef. Rob. Smith the son and his heirs expectant; without which Rob. the son, the said Walter cannot answer to the avowry aforef. of the said Nicholas, nor the plea thereof bring into judgment: and prays aid of the aforef. Rob. Smith the son, who is present here in court in his proper person, and freely joins himself to the said Walter in aid against the aforef. Nicholas, in the plea aforesaid, &c. And upon this, as well the said Walter, as the aforef. Robert Smith the son, who, &c. say that the aforef. Nicholas, for the reason before alledged, ought not to avow the taking of the cattle aforef. in the said place in which, &c. to be just; because protesting, that the aforef. Rob. Smith the son, did not hold the aforef. 20 acres of land with the appurtenances, called Newton,

Plea in bar to
the Cognizance.

Note, that if he
in the reversion
will not freely
join himself, that
a writ of sum-
mons ought to
be granted against
him to aid the
tenant.

ton in Tallan aforefaid, of the aforefaid J. Bevil, as of his manor of Keligath by knight's fervice, that is to fay, by homage, fealty, and efcuage, to the lady the Queen, when it fhould happen, 42 fhillings, and to more, more, and to lefs, lefs, &c. As alfo by the fervice of doing fuit at the court of the faid John Bevil, of his manor aforefaid twice by the year, that is to fay, once within one month after the feaft of St. Michael the Archangel, and again within one month after the feaft of Eaſter in every year, at *that* manor to be holden, as the aforefaid Nicholas above hath alledged; for plea he faith, that the aforefaid John Bevil never was feiſed of the aforefaid fervices, as the faid Nicholas above hath alledged, and this they are ready to verifie, wherefore inafmuch as the faid Nicholas above acknowledgeth the taking of the cattle aforefaid, in the aforefaid place in which, &c. the aforefaid Walter and the aforefaid Robert, who, &c. pray judgment and their damages, by the occaſion of the taking, and unjuſtly detaining of the cattle aforefaid, to the faid Walter to be adjudged; and the aforefaid Nicholas, as before faith, that the aforefaid John Bevil was feiſed of the aforefaid fervices, by the hands of the aforefaid Rob. Smith the father, as by the hand of his very tenant, as he hath above alledged; and of this puts himſelf upon the country; and the aforefaid Walter, and the aforefaid Robert Smith the ſon, who, &c. likewise; therefore it is commanded to the Sheriff, that he cauſe to come here from the day of St. Martin, in 15 days, 12, &c. by whom, &c. and who neither, &c. to recognize, &c. becauſe as well, &c. proceſs againſt the jurors, to try the iſſue aforefaid, is continued until 15 days of Eaſter, in the 19th year of the reign of Q. Eliz unleſs the juſtices aſſigned to take the aſſiſes in the county aforefaid by the form of the ſtatute, &c. upon Monday, in the 5th week of Lent in the ſaid 19th year ſhall firſt come; at which aſſiſes, the verdict was given as followeth. The jurors ſay upon their oath, that the within named John Smith the father, held the tenements aforefaid with the appurtenances, called Newton, of the within named John Bevil, as of the within written manor of Keligath, by knight's ſervice within written; and that the ſaid John Bevil was feiſed of the fealty and ſuit of court only, parcel of the ſervices within written, by the hands of the aforefaid Robert Smith the father, as by the hands of his very tenant. But whether the aforefaid feiſin of fealty, and ſuit of court aforefaid, be a good and ſufficient feiſin of the whole ſervices within written, or not, the jurors are altogether ignorant, and pray therefore the advice and diſcretion of the Juſtices aforeſaid. And if upon the whole matter aforeſaid in form aforeſaid found, it ſhall ſeem to the ſame juſtices, that the aforeſaid feiſin of fealty and ſuit of court, be not a good and ſufficient feiſin of the whole ſervices aforefaid, then the jurors ſay upon their oath, that the aforefaid John Bevil was not feiſed of the within written ſervices,

Replication,

services by the hands of the aforesaid Rob. Smith the father, as by the hand of his very tenant, as the said Walter hath within alledged, and then they assess the damages of him the said Walter, by occasion of the taking, and unjustly detaining of the cattle aforesaid, besides his costs and charges by him about his suit in this behalf expended, to 12 pence, and for his costs and charges to 40 shillings, and if upon the whole matter aforesaid, it shall seem to the Justices, that the said seisin of fealty, and suit of court aforesaid, be a good and sufficient seisin of the whole services within written, then the said jurors say upon their oath aforesaid, that the said John Bevil was seised of the services within written, by the hands of the aforesaid Robert Smith the father, as by the hands of his very tenant, as the aforesaid Nicholas hath within alledged. And then they assess the damages of the said Nicholas, by occasion of the premises, besides his costs and charges by him about his suit in this behalf expended to 12 pence, and for his costs and charges to 40 shillings. And because the Justices here will advise themselves of and upon the premises before they give their judgment thereof, day is given to the parties here, until in the Morrow of the Holy Trinity, to hear their judgment thereof, because the same justices here thereof are not yet, &c. And so the plea aforesaid, continued until the Morrow of the Holy Trinity, in the 25th year of Queen Elizabeth, on which day judgment was given as followeth. At which day, here cometh as well the afores. Walter Parker, by his attorney aforesaid, as the aforesaid Nicholas Francis, by William Aylesbury his attorney. And upon this, the premises being seen, and by the Justices here fully understood, it seemeth to the Justices here, that the aforesaid seisin of fealty, and suit of court aforesaid, is a good and sufficient seisin of the whole services aforesaid; therefore it is considered, that the aforesaid William Parker, take nothing by his writ aforesaid, but be in mercy for his false clamour, and that the afores. Nicholas Francis, thereof go without day, and that he have a return of his cattle afores. to be kept by him irreplegible for ever, &c. It is also considered, that the aforesaid Nicholas Francis recover against the aforesaid Walter Parker, his damages aforesaid to 41 shillings, by the said jurors in form aforesaid assessed, as also 13l. to the said Nicholas, at his request for his costs and charges aforesaid, by the court here of increase adjudged, which damages in the whole do amount to 15l. & 1s. &c.

B E V I L's Case.

Mich. 17 & 18 Eliz. Rot. 1739.

In the Common Pleas.

IN REPLEVIN.

Exposition of the
Stat. 32 H. 8. c. 2.
of Limitations.

BETWEEN Walter Parker, plaintiff, and Nicholas Francis, defendant, for taking of his cattle in Tallan in the county of Cornwall, in a place called Newton; the defendant made conusans as Bailiff to John Bevil, Esq. by reason that the place where, &c. contained 20 acres, whereof one Robert Smith was seised in fee, and held them of the said John Bevil, as of his manor of Keligath in the said county, by knight's service, viz. by homage, fealty, and escuage, *scil.* when escuage runs to 40s. 40s. and when to more, more; and when to less, less; and by suit of court *bis per annum*, of which services he was seised by the hands of the said Robert Smith, as by the hands of his very tenant, and made conusans for homage: and issue was taken that the said John Bevil *nunquam fuit seifitus de præd' servitiis, prout* the said Nicholas had alledged. And the jury gave a special verdict, that the said John Bevil was seised of the fealty only, &c. And if the seisin of fealty was a sufficient seisin of all the services was the doubt, which the jurors referred to the consideration of the court. And this point was made one of the principal points in the Serjeant's Case, which was argued by Popham, Rhodes, Fenner, Shute and Gawdy, Serjeants, and Windham and Anderson the Queen's Serjeants, *Pasch.* 21 Eliz. the record and pleading of which Serjeant's case is entered, Hil. 20 Eliz. Rot. 1745. And this case at bar was many times argued in the time of Sir James Dyer, and after his death, after many argum. at the bar and bench, was adjudged, by Anderson, Ch. Justice, Mead, Windham, and Periam, that the seisin of the fealty was (a) seisin of all the said services, and therewith agree 44 E. 3. 11. b. 8 H. 6. 16. and the reason was, that when the

Anderf. 57, 58.

Seisin of Fealty
is of all other
Services.To what Rent
and Services the
Statute doth not
extend, &c.(a) Co. Lit. 63. a
45 E. 3. 28. a.
Br. Avow. 24, 52.
Fitz. Avow. 71.
3 H. 6. 17. b.
Postea 8. b.

(a) Lit. sect. 91.
Co. Lit. 67. b.

(b) 44 E. 3. 11. b.
Co. Lit. 68. a.
45 E. 3. 28. a.
Br. Avow. 24, 52.
Fitz. Avow. 71.
3 H. 6. 17. b.
Antea 8. a.

(c) 2 Brownl. 99.
Lit. sect. 85.
Co. Lit. 68. a.

64. a.
(d) 2 Brownl. 99.
Co. Lit. 68. a.

Note.

(e) 42 E. 3. 26. a.
Fitz. Avow. 67.
27 Aff. 51.
Br. Distr. 34, 36.
29 E. 3. 24. a.
2 Inst. 106, 107.
1 Rol. 674.
Fitz. Avow. 250.
2 Brownl. 90.
11 Co. 44. a.
13 Co. 2.
(f) 9 Co. 35. a.
Hutt. 20.
Winch. 31.
10 H. 7. 15. a.
Co. Lit. 153. a.
315. a.

(g) Co. Lit. 68.
a.

(b) 2 Roll. 462.
(i) Keilw. 3. b.

tenant does fealty, he takes a corporal oath, that he will be faithful and true to the lord, and bear faith (a) to him for the tenements which he claims to hold of him; and that he will lawfully do the customs and services which he ought to do, so that the doing of this service (by which he swears to do all services) is sufficient (b) feisin of all. And true it is that Littleton says, that homage is the (c) most honourable service, and the most humble service of reverence that a freeholder can do to his lord: but also it is true, that fealty is a more (d) sacred service than homage; for that is done upon oath, and the other not; and it is to be observed, that these words *scil.* (will be faithful and true to him, and bear faith to him for the tenements which he claims to hold of him) are also parcel of the words in doing of the service of homage, and feisin of part of any service is feisin of the whole, as after appears. And that is the reason that the law makes so great account of the feisin of these services of homage and fealty; for the feisin of them (because it is the feisin of all other services) is so inestimable in law, that no distress for them of any goods or chattels (of what value soever) is in judgment of law (e) excessive; and although the lord often distrains for them, so that the tenant cannot till his land, yet the tenant shall not have assise *de multiplici districtione*, as he shall have for rent or other profits. *Vide* 28 Aff. 50. 11 H. 4. 2. a. 42 E. 3. 26. a. Br. Distress 80. And in this case these points were also resolved. 1. That feisin of superior service is (f) feisin of all inferior services which are incident to it; as feisin of escuage is feisin of homage and fealty, and feisin of homage is feisin of fealty, and feisin of the rent is feisin of the fealty where the seigniorship is by fealty and rent, *vide* 3 E. 2. Avowry 188. 5 E. 2. Avowry 209. 9 E. 2. *Monstrans des faits* 41. 19 E. 2. Avowry 224. 7 E. 4. 28 & 29. 13 E. 3. Avowry 103. 21 E. 3. Avowry 115. 27 H. 8. 21. a. *Pasch*, 1 & 2 Ph. Mar. in *Communi Banco*, *Ret.* 329. It was adjudged, that where the seigniorship is by fealty and rent, that feisin of the rent is feisin of the fealty, and so is the book adjudged in 29 E. 3. 31. a. and with that agrees 3 E. 2. Avowry 188. 2. It was resolved, that the doing of homage is (g) feisin for all services, as well inferior as superior, because in doing of homage, he takes upon him to do all services, and therefore his service is sufficient feisin of all the services. And therewith agrees 13 H. 4. 5. b. feisin of homage is feisin of escuage, which is superior, and of relief, which is inferior, 22 Aff. 66. payment of 1 d. in the name of attornment of the whole, may be sufficient feisin of (h) 4 rents. 3. That feisin of rent, or (i) suit, or other service which is annual, is sufficient feisin of escuage, homage, fealty, ward, relief, heriot-service, service to cover the hall of

of the chief house of the manor, or for impaling the lord's park, or such casual services, which perhaps will not happen in 40, 60, or 70 years; and therefore there is great reason that seisin of annual services should be seisin of all such casual services, and therewith agrees, 20 E. 3. Avowry 131. that seisin of rent and other annual services, is seisin of relief and other services casual or accidental, and 7 E. 6. Br. Gard. 69. & Avowry 69. that it was agreed by the Justices of both Benches, that where the feignior is by knights service and rent, that seisin of the rent which is annual and inferior to all the other, is a good seisin, to have the wardship of the heir of the tenant; and therefore the opinion of Brook there, that it shall not be a seisin to make an avowry is not law; for the case of the ward is the stronger case. But it was said, that seisin of one annual service is not seisin of another annual service: as if there be lord and tenant by fealty, 10s. rent, and three work days by the year, seisin of the rent is not seisin of the work days; nor seisin of rent is not seisin of suit of court which is annual, *vide* 16 Eliz. Dyer 330. and the reason is, because it shall be accounted the folly of the lord, that he does not get seisin of that which is due yearly; and it would be mischievous to the tenant, for perhaps the work days were discharged in ancient times, which now cannot be shewed, upon which suits and troubles would ensue. But *nota* reader, that all this which has been said, is to be intended of seisin in law, and not of actual seisin; for seisin of fealty in the case at bar, is no actual seisin of homage, nor of suit of court; nor seisin of fealty is not actual seisin of rent. *Vide* 8 H. 7. 17. 20 H. 3. Affise 433. 40 E. 3. 22. 49 Aff. 6. 44 E. 3. 11. Br. Seisin 40. But seisin of any part of any service is actual seisin of the whole to have affise. *Vide* 5 E. 4. 2. b. 12 E. 4. 7. 8 E. 3. 13. a. 8. Aff. 4. 44 E. 3. 32. 3 E. 3. Affise 175; and as to an avowry, seisin in law is sufficient, but as to have affise, actual seisin is requisite; so the seisin which is requisite in a writ of right of land, ought to be actual and not seisin in law, as appears 35 E. 3. Droit 30, and Lit. lib. 3. cap. Releases 112. agrees thereto. If a man makes a lease for life, or a gift in tail, yielding the first year a quarter of wheat, and afterwards the yearly rent of 100 shillings, seisin of the wheat is seisin of the rent, whereof he may have affise, for all is but one reservation. *Vide* 5 E. 4. 2. 44 E. 3. 11. b. 15 E. 3. Exec. 63. it is said, that in the same case all is one freehold, and seisin of the one is the seisin of the other to have affise, which was affirmed to be good law. It was also said, if a mesnalty becomes rent-seck by surplussage, the ancient seisin is sufficient: for the mesnalty is extinct by the act of the lord and of the tenant paravail, and the nature

Dyer. 330. pl. 19.

49 E. 3. 15. b.
Lit. sect. 235.
Co. Lit. 153. a.
315. a. 2 Rol.
463. 6 Co. 57. a.

Kelw. 164. a.
Plowd. 154. b.
4 Co. 49. b.

Cr. Car. 82.
1 Jones 2. 4.
Lit. sect. 232.
Co. Lit. 135. a.

(a) Co. Lit. 153. a.
Kelw. 104. a.
7 Co. 24. b. Cr.
Car. 82. Perk.
sect. 323. Lit.
sect. 226.

Lit. sect. 228,
229.
Co. Lit. 151. b.

(b) 1 Leon. 266.

(c) 1 Rolles 314.

(d) Co. Lit.
202. b. 2 Rolles
465.

(e) 2 Rolles 465.

(f) Co. Lit.
315. a. 10 Co.
227. b.

of the rent of the mesne is not altered by his own act, but by the act of others. And therefore, although the rent is become seck, yet he shall (a) distrain for it, as is said in 2 E. 2. Extinguishment 6 *vide* 31 Aff. 23. 26 H. 6. Extinguishment 7. 7 Aff. 2. 2 (4) E. 3. 42. 20 E. 3. Avowry 126. *vide* 50 E. 3. 26. a presentation to a prebend which is after changed into a treasury, shall serve to maintain a *quare impedit* upon disturbance to the treasury. But if there be lord and tenant by fealty and rent, and the lord grants over the fealty saving the rent; or if a man makes a gift in tail, or a lease for life, rendering rent, and grants over the reversion, excepting the rent, in these cases the nature of the rent is altered by his own act; and therefore the ancient seisin when it was a rent-service will not serve, when by his own act the (b) nature of the rent is altered; and assise of any rent seck he cannot have, for he was never seised of any such rent; yet such rent-seck which was once rent-service, seems to be apportionable by the book in 32 Aff. 10. return irrepleviable is a good seisin of rent, as it is held 2 H. 4. 23. for otherwise the tenant might defeat the lord of his seignior, and the lord would never attain to his services. So in avowry for suit, if the lord recovers (c) damages for the suit, it is a sufficient seisin, *causa qua supra*. If the lord grants his seignior upon (d) condition, and the tenant pays the rent to the grantee, afterwards the condition is broken and the lord distrains for his services, upon rescous made he shall have assise, for the seisin before is sufficient. Otherwise if a man gives land upon condition, the condition is broken, the ancient seisin is not sufficient, but he ought to enter and gain a new seisin: but note in the case of rent the distress is in lieu of an entry. *Vide* (e) 15 E. 3. Assise 95. & 15 Aff. 12. *quod vide Brook seisin* 38. If the disseisor releases to the disseisor upon condition, and afterwards the condition is broken, the disseisor shall have assise for the first disseisin, as appears by 17 Aff. 2. & 17 E. 3. 2. where in assise of land the tenant pleaded the release of the plaintiff, the plaintiff pleaded a defeasance of the release upon a certain condition, and pleaded performance of the condition, and so maintained the assise, which proves that by the performance of the condition, and the bringing of the assise, the right which was released upon condition was re-vested in the plaintiff for without a right he could not have assise, and so the ancient seisin sufficient. If a man grants over divers and several rents, and the tenant attorns, and gives 1 d. in the name of seisin of all the rents, it is a good seisin for all to have (f) assise, and yet no rent was due or payable at that time, and wherewith agrees 22 Aff. 66. And yet if there be lord and tenant by fealty, and 20 d. rent, and the lord grants

grants over his feigniory, and the tenant pays 2d. to the grantee in name of feisin of his rent, yet at the rent-day the lord shall have his whole rent of 20d. for the 2d. cannot be (a) parcel of the rent, for no rent is due or payable till the day, and yet it shall enure to this purpose, *sc.* to give feisin of the rent. *Vide* 34 H. 6. 42. a. 37 H. 6. 38. b. Br. Seisin 15. 5 E. 4. 2. a. 25 E. 3. 44. b. by Hil. 29 E. 3. 31. 22 Aff. 66. Lit. lib. 3. cap. Attorn. 127. a. b. Then it was moved, if feisin of fealty in the case at bar is feisin of all the other services within the statute of * 32 H. 8. cap. 2. by which statute it is provided, that none shall have a writ of right of the feisin of his ancestor or predecessor, unless the feisin was within (b) 60 years before the *teste*; nor any writ of Mortdancestor, Aiel, Cofinage, or writ of Entry *sur disseisin*, unless the feisin was within 50 years before the *teste*; nor any action of his own feisin or possession, unless within (c) 30 years; nor any avowry, or conusans for any rent, suit, or service, unless feisin was had within 50 years before the avowry made: in all which four branches this word (feisin) is spoken indefinitely, and therefore if the act had not gone further, this word (feisin) should be construed according to the subject matter, sometimes for actual feisin, and sometimes for feisin in law; and therefore as to the writ of Right, writ of Mortdancestor, Aiel, &c. Assise, &c. it should be intended of an actual feisin, and not of a feisin in law; so that the three first branches are to be intended only of an actual feisin, and the fourth branch concerning avowries extends to feisins in law, as well as to feisins in fact, or actual feisins: but the words of the act (upon which the doubt arises) go farther, *sc.* And be it further enacted, that if any person or persons shall sue any of the said actions, writs, &c. or make any avowry, conusans, prescription, or claim for any rent, suit, service, or other hereditament, and cannot prove that any of his ancestors or predecessors were in actual possession, or feisin of or in the same lands, tenements, rents, services, &c. within the years before limited by this act, and in manner and form afores. if it be traversed or denied by the plaintiff, demandant, avowant, or by the party tenant, or defendant, that after such trial had, the party and his heirs shall be barred of all such writs, actions, avowries, conusans, prescription, title and claim for the same lands, tenements, and hereditaments, &c. And it was objected, that these words (actual possession or feisin) exclude feisin in law, and therefore this act has altered the common law: for although at the common law, feisin in law was sufficient to make avowry, yet this act allows only of actual possession

Lit. sect. 235,
565.
Co. Lit. 159. b.

(a) Co. Lit.
315. a.
2 Inst. 95. 96.

* Lit. Rep. 342.
1 Bulstr. 162.
Moor 31. Co.
Lit. 115. a.
(b) 6 Co. 59. a.
1 Bulstr. 162.

(c) 1 Bulstr. 162.
2 Inst. 95.
Co. Lit. 268. b.

or seisin; and the reason of it, as was said, was because actual seisin is the sure cognisance and ensign of right: but if the seisin of the fealty should be seisin for all the other services, then would contention arise what were the other services (which peradventure were never done) and which cannot be known by any seisin had of them. And therefore it was said, that this act by express words extends only to actual possession and seisin, and not to relieve those who for so long time have neglected to have actual seisin of their services, and especially of suit, which ought to be done twice every year: and it was said, that it was *crossa & supina negligentia*, which this law did never intend to relieve; for as it is commonly said, *vigilantibus (a) & non dormientibus jura subveniunt*. To which it was answered and resolved *per totam curiam*, that seisin in law was sufficient to make avowry within the intention and the letter also of the act; for the intention of the act was to limit the time within which seisin ought to be had, and not to exclude any seisin which was lawful seisin by the common law, and that appears by the preamble, for there it is said, "forasmuch as the time of limitation, &c. extend, and be so far, and so long time past, that it is above the remembrance of any living man, &c." Also the former acts of limitation, *scil.* W. 1. cap. 38. W. 2. cap. 2. & 46. do not exclude any manner of seisin which was sufficient at the common law. Also it is not against the letter of the act; for the three first branches extend to actual seisin, and the fourth extends as well to seisin in law as to actual seisin: then the said words of the act, *sc.* "actual possession, or seisin" in the disjunctive, makes a distinction between actual possession which refers to the three first branches and a seisin, be it actual or in law, which refers to the fourth, so that actual is coupled with possession, and seisin is disjoined by this word (or) and stands of itself indefinitely, *& eo potius*, because the words subsequent are, "and in manner and form as is aforesaid," which words refer actual possession or seisin to the said four branches precedent, so that *reddendo singula singulis*, all stands well together. 2. It was resolved, that the said act doth not extend to such rent or service which by the common possibility may not happen or become due within 60 years: as if a feign. consists of homage (b) and fealty only, for the tenant may live above 60 years after they are done; so if the service be to cover the lord's hall, (c) or to go with him when there shall be war between the King and any of his enemies, such casual services which by common possibility may not happen within 60 years are not within this act. The same law of (d) *formedon in descender*, for the tenant in tail may live

(a) 1 Sid. 55.
Postea 82. b.
2 Inst. 690. 2 Co.
26. b. Palm. 157.

(b) 2 Inst. 95,
96. Co. Lit.
115. a.
(c) Co. Lit.
115. a. 2 Inst. 95.
(d) Lit. Rep.
342. Co. Lit.
115. a. 1 And.
16. N. Bendl.
194.

live 60 years after discontinuance, and although *in facto* he dies within the time, so that the issue may bring his *formedon*, and although the issue does not prosecute any writ within the time, yet the issue may bring it at any time, for by common possibility the writ of (a) *formedon in descender* was not within the statute, as it is adjudged in *Fitz. William's case, M. 10 & 11 Eliz. which is now reported by the Lord Dyer, fol. 278. Also there it is said, that the seisin of the donee was never traversable: the same law of homage and fealty, and other such accidental services, although they become due within the time limited by this act, and by laches of the lord no seisin is had of them, yet he may distrain for them when he will, for they are not within the purview of the act: the same law, if the lord releases to the tenant, as long as J. S. has heir of his body, and 60 years pass, and afterwards J. S. dies without heir of his body; in this case although the 60 years are past, yet he may distrain, for it was impossible that he should attain to any seisin within that time, & (b) *impotentia excusat legem*. And a man may hold by homage and fealty, and they shall never be done by him. As if land held by homage and fealty is conveyed to a Mayor and Commonalty, or other (c) Corporation aggregate of many, in this case they hold by homage and fealty, but they cannot do them. And therefore although they have enjoyed the land above 60 years, yet if they alien the land, the lord may distrain for the homage and fealty, *vide* 33 H. 8. Br. Fealty 15. And it was agreed, that the writ of *escheat*, (d) *cessavit*, or writ of (e) *rescous*, are not within this act, for in these writs the seisin is not traversable, but the tenure. Also in writs of *escheat* and *cessavit* they demand the land, and cannot alledge any seisin in the same land, &c. as the statute speaks, and therefore these writs are not within the statute, for the act extends only to such writ where the demandant or his ancestors may have seisin of the land in demand within the time of the limitation prescribed by the act, and the stat. doth not compel them to any impossibility. And it is agreed in 21 H. 6. 22. a. that in a writ of *escheat* (f) or *cessavit*, the demandant shall not alledge esplees, and the reason is, because he claims the land by reason of his feigniory, and not by any seisin of the land in him, or any of his ancestors. So *nota*, altho' the lord was not seised of his services within the time of the limitation, yet if the tenant dies without heir, the land shall escheat, for at the time of the escheat the feigniory remains, altho' there wanted seisin; and in the same case, if the tenant ceases for two years, and the land is not open and sufficient to his distress, the lord shall have *cessavit* although he wants seisin of his services, for

(a) Kelw. 272. b.
213. a. Bendl.
in Ash. 24.
1 And. 16. N.
Bendl. 194.
Dyer 278. pl. 2.
Co. Lit. 115. a.
21 Jac. cap. 16.
* Dyer 290, 291.

(b) 1 Co. 98. a.
5 Co. 22. a.
6 Co. 21. b. 68. a.
8 Co. 172. b.
9 Co. 73. a.
10 Co. 139. b.
Co. Lit. 29. a.
Hard. 387.
(c) Co. Lit. 66. b.
7 Co. 10. b. Calvin's Case.
10 Co. 32. b.
(d) Liv. Rep.
342. Moor 44.
(e) 6 E. 4. 14. b.

(f) Fitz. Cessavit 6. Br. Cessavit 31. Br. Esplees 5.

in *cessavit* seisin is not traversable, 8 E. 3. 46. F. N. B. 209. E. *vide* in 10 & 11 El. Dyer 278. And although the lord was never seised, yet because the seignory remains, if he distrains, the tenant ought not to make rescous, as some opinions are in 40 E. 3. 33. a. 6 R. 2. Rescous 10. 22 H. 6. 2. b. 6 E. 4. 11. b. 7 E. 4. 20. a. But it was resolved, that if nothing is behind, and the lord distrains, the tenant may make (a) rescous; or if he often distrains so that he cannot manure his land, he may have his assise *de* (b) *multiplici districtione* and that in such case the tenant may make rescous as divers judgments have been given. *Vide* 2 H. 4. 21. b. 8 H. 4. 1. 4 E. 6. Distress 75. Br. by the Justices. *Vide* 31 E. 3. Rescous 17. 39 E. 3. 45. 39 H. 6. 7. F. N. B. 102. E. 27 Aff. 51. 28 Aff. 50. *Nota* reader, a great doubt in our books well resolved; but for wrongful distress where nothing is arrear, the tenant shall not have an action of (c) trespass *vi & armis* against the lord, for that is prohibited by the statute of Marlebr. cap. 3. *non ideo puniatur dominus per redemptionem*. And if lord and tenant are by fealty and 2s. rent, and the lord by encroachment, *sc.* by voluntary payment of the tenant gets seisin of more than he ought to have, the law so greatly favours seisins and possessions, that he shall not avoid this seisin had by encroachment in (d) avowry, unless it is in the case of the (e) successor, as 4 E. 2. Avowry 204. is agreed; and in case of the issue (f) in tail, as is held in 20 E. 3. Avowry 131. But seisin by encroachment shall be avoided in Assise, (g) and *Cessavit*. *Vide* 22 Aff. 68. 22 E. 3. 18. 28 Aff. 33. 12 E. 4. 7. 20 H. 7. 11. 10 H. 6. 3. b. the same law in trespass. Also if he distrains, *sc.* for the due rent and the encroachment also, for the whole rent arrear; the tenant may tender that which is due of right, and may make rescous if the lord will not accept it, *vide* 12 E. 4. 7. 5 E. 4. 62. 87. and shall not be driven to *ne injuste vexes*, or *contra formam feoffamenti*, as his case is; but it shall be avoided in an action brought by the lord for the rescous, or in trespass brought by himself for the distress for the sum which was encroached, and which of right was not due. But if the lord encroaches more by (b) coercion of distress than he ought to have, (although the coercion be to his goods) yet he shall avoid such seisin in avowry, *vide* 10 E. 3. 26. 12. 22 E. 4. 7. Long 5 E. 4. 87. 20 E. 4. 17. 8 H. 6. 18. 30 H. 6. 5. 10 H. 7. 11. Plow. Com. 94. b. in Woodland's Case. 3. It was resolved, that altho' a man has been out of possess. of land for 60 years, yet if his entry is not tolled he may well enter, and bring any action of his own possession, for the first clause doth not bar any right, but prohib. that no person shall sue, have, or maintain any writ of right, or make any prescription, title, or claim, for

(a) 6 Co. 23. a.
Co. Lit. 160. b.

(b) 27 Aff. 71.
Br. Assise 273.
28 Aff. 50. Br.
Assise 290. Br.
Distress 34. 8 Co.
50. a. b. 11 Co.
44 a. F. N. B.
108. i. 69. h.
Note.

(c) 2 Inst. 105.
44 E. 3. 20. a.
9 Co. 76. a.
10 E. 4. 7. a.
9 H. 7. 4. a. 14. a.
11 H. 4. 78. b.
Co. Lit. 127. a.
Fitz. Office del
Court 7. Br. Of-
fice del Court 29.
Plow. 66. b. 84.
85. a.

(d) 9 Co. 34. a.
Doct. pla. 318.
5 Co. 100. b.
2 Inst. 21.

(e) 2 Inst. 21.
9 Co. 34. a.
Doct. pla. 318.

(f) 2 Inst. 21.
9 Co. 34. a.
10 Co. 108. a.
Doct. pla. 318.

(g) 5 Co. 100. b.
9 Co. 34. a.
2 Inst. 21. Doct.
pla. 318.

(b) 2 Inst. 21.

for any lands, tenements, rents, commons, &c. of the possession of his ancestor and predecessor, but only of the seisin of some of his ancestors within 60 years: but if his entry is congeable, and he enters, he may have an action of his own possession: and the first and second clauses extend only to seisin *ancestral*, and not to a writ of right brought of his own seisin. And the third branch extends only to actions of his own possession, and not to entries; the fourth to avowries, and the fifth to formedons and certain actions there mentioned. *Nota* reader, forasmuch as by these resolutions it appears, that the services of homage and fealty are not within the act of 32 H. 8. and that seisin of rent, or other annual service is seisin of homage and fealty, and that seisin of homage or fealty is seisin of all services annual or not annual; thence it follows, that when the tenant has done homage or fealty, (which the lord may compel him to do) it shall be seisin of all other services, as to make avowry, which of right ought to be done, *Co. Lit. 68. a.* although the lord, nor any by whom he claims have had seisin within 60 years.

[See the late statute touching entries and claims, &c.]

Actions

ACTIONS for SLANDER, viz.

The Lord CROMWELL's Case.

Trin. 20 Eliz. Rot. 28.

In the King's Bench.

H. Lord Cromwell v. Denny,
Poph. 69.
1 Danv. 165.

* Note, this stat. is not of record in the parliament rolls, 4 Inst. 51. Sed vide Pryn. contra.
† See Cro. Car. 136.
Palm. 565.

(a) Cro. Car. 136.

(b) Doct. pla. 20, 21. 3 Bulst. 266. 1 Rol. Rep. 427.

(c) Doct. pla. 93. 340.

(d) Hutt. 56.

(e) Cr. Car. 135, 136. 3 Bulst. 91.

*Twas made on occasion of a quarrel between John of Gaunt and W. Wickham, who had slandered Gaunt with illegitimacy, &c.

HENRY Lord Cromwell brought an action *de scandalis magnatum* against Ed. Denny Vicar of Northlinham in the county of Norfolk, *tam pro dom' Regina, quam pro * seipso*; and declared upon the stat. of 2 R. 2. cap. 5. that if any contrive *aliqua falsa nova, horribilia & falsa nuncia de praelatis, du-cibus, comitibus, & aliis proceribus † & Magnatibus regni, &c.* by which debate may arise betwixt the Lords and Commons (which God forbid) by which danger, mischief, and destruction may happen to the whole realm, &c. and *quicumque contra fecerit*, shall incur the penalty of the stat. of W. 1. c. 33. And the defend. was charged that he said to the plaintiff (a) then a baron of the realm, "It is no marvel that you like not of me, " for you like of those that maintain (b) sedition against the " Queen's proceedings." The defendant justified the words, upon which the plaintiff demurred, and the bar was held insufficient. And term' Trin' anno 23 Eliz. in arrest of judgment it was moved by the defendant's counsel, that the declaration was insufficient, because the said act of 2 R. 2. was (c) misrecited; for the words of the act are, *Si ascun controver ascun faux nouvelles & horribles & faux messoinges*, which word (d) (*messoinges*) he who translated the statutes at large into English, has translated (*messages*) which was the reason that he who drew the declaration in the case at bar inserted the said word (e) (*nuncia*) where it should be *mendacia*. 2. The said act saith, "and whosoever shall do it, shall incur, &c." And the plaintiff in his declaration saith, *& quicumq; contra fecerit*, which is as much as to say, "who shall not do it;" but against that it was objected, that the said act was a private act, it concerning only the prelates,

prelates, nobles, and certain great officers, whereof the court would not take notice *ex officio*; and therefore the court ought to take the act as the party has alledged it: but it was resolved by Wray Chief Justice, Sir Thomas Gaudy, & *totam curiam*, that it was such an act, whereof the (a) court ought to take notice; and *eo magis* because it by a means concerns the King himself. 1. Forasmuch as it touches the prelates, nobles, and great officers, which are of the King's council, and of eminent qualities, and serve him in so high and honourable offices which they have under the King, and by his royal authority have the administration of justice to his subjects, by which it appears that the flandering of them principally concerns the King himself in his royal government. 2. Forasmuch as the statute saith, that danger, mischief, and destruction may happen to the whole realm, &c. that also concerns the King, for he is the head of the realm; and these are the reasons that always such actions *de scandalis magnatum* have been brought upon the said stat. *tam (b) pro domino rege quam pro seipso*, and of all statutes which concern the (c) King, the Judges ought to take notice. It was likewise resolved that if the act was private, and that the court ought to take it to be such as is alledged; then the said act was against law, and reason, and therefore void: for as it is alledged, those who do not offend shall be punished, and that was *condemnare innocentem & demittere reum*; wherefore judgment was given against the plaintiff *quod nihil capiat per billam*. And afterwards the plaintiff brought a new action, and amended the faults of the declaration: and then the court was moved that the said words were not actionable, because it might well be that the plaintiff meant liking of some persons which maintain sedition against the Queen's proceedings, and yet he did not (d) know that they maintain sedition, nor do the words import that the plaintiff knew that they maintained sedition. And it was said, *quod sensus verberum est duplex, scil. mitis & asper; & verba semper accipienda sunt in (e) mitiore sensu*. To which it was said, that sedition is a publick thing. *Et dicitur seditio (f) quasi seorsum itio magni populi, quando itur ad manus*, which is notably described by the poet:

*Ac veluti magno in populo cum sæpe coorta est
Seditio, sævitque animis ignobile vulgus,
Jamque faces & saxa volant, furor arma ministrat.*

Virg. Æn.

By which sedition (being so publick and violent) it was said that by common intendment the plaintiff had notice of it; and it is not like felony or murder which may be clandestine, and done in secret. But as to *that*, the Judges did not deliver any opinion, for they said, that upon argument and consideration they might alter their opinion which

(a) Hob. 226,
310. Doct. pla.
336, 337, 338,
339. 8 Co. 28. a.
b. Postea 76. a.
b. 77. a. Plowd.
231. a.

*Handing Officer
under King, is flandering King -
actions brought tam
pro domino rege
quam pro seipso -*

(b) Doct. pla.
340.
(c) Postea 77. a.
8 Co. 28. a.

(d) Palm. 278.
Cro. El. 52, 251,
487, 746. Cro.
Jac. 59, 268,
629. Yelv. 64.
(e) 4 Co. 20. a.
Godb. 278.
Postea 15. b.
17. b. Hutt. 38,
65, 113.

Virgil 1 Æneid.
1 Roll. 71, 72,
73. 1 Mod. Rep.
19, 21. Poph.
211. Palm. 29.
(f) Rushw.
Collect. Append.
19, 20, &c.

which they now conceived, which would be dangerous to the party; and therefore they said to the defendant's counsel, be well advised, and plead, or demur at your peril; wherefore they pleaded a special justification, (well knowing that the other matter would be saved to them) and the effect of the justification was, that the defendant was Vicar of Northlinham, which was a benefice with cure, and that the plaintiff procured J. T. and J. G. to preach severally in the church of Northlinham, who in their sermons inveighed against the Book of Common Prayer, which was established by the Queen and the whole parliament in the first year of her reign, and affirmed it to be superstitious and impious, &c. upon which the plaintiff and defendant speaking in the said church of these sermons, because the Vicar knew they had no licence, nor were authorised to preach; when they were ready to preach, before their sermons forbade them, but they by the encouragement of the plaintiff proceeded: the plaintiff said to the defendant, "Thou art a false varlet, and I like
 "not of thee;" to which the vicar said, "It is (b) no matter though you like not of me, for you like of these *innuendo*
 "præd" J. T. and J. G. that maintain sedition, (*innuendo*
 "*seditionem illam doctrinam*) against the Queen's proceedings;" and so justified: and it was moved by the plaintiff's counsel, that this bar was insufficient for two reasons. 1. That the matter of justification was insufficient, because (as has been said) sedition cannot be committed by words, but by publick and violent action. 2. If the matter of justification was sufficient, then upon the said dialogue between the plaintiff and defendant the defendant is not guilty: but it was said, that such justification dialogue-wise had not been seen before; but if the truth of the cause is such, he ought to plead *not* guilty, and give the special matter in evidence. But if he will justify, he ought to justify the words in the same sense they import upon the matter alledged in the declaration. As if a man brings an action on the case for calling the plaintiff (c) murderer; the defendant will say, that he was talking with the plaintiff concerning unlawful hunting, and the plaintiff confessed that he killed several hares with certain engines; to which the defendant answered and said, "Thou art a murderer," (*innuendo* the killing of the said hares) this is no (d) justification, for he does not justify the sense of the words which the declaration imports, and therefore he ought to plead not guilty: but as to *that* it was answered by the defendant's counsel, and resolved by the whole court, that the (e) justification was good. For in case of slander by words, the sense of the words ought to be taken, and the sense of them appears by the cause and occasion of speaking of them: for *sensus verborum ex causa dicendi accipiend' est, & sermones semper accipiendi*

(a) Doct. pla.
20, 21.

(b) Doct. pla.
20, 21.
3 Wilson 177.

(c) Doct. pla. 21.

(d) Doct. pla. 21.
Postea 14. 2.

(e) Doct. pla.
20, 21.

piendi sunt secundum subjectam materiam. Then in this case the defendant's counsel have well done to shew the special matter by which the sense of this word (sedition) appears upon the coherence of all the words, that it was in the defendant's meaning, the said seditious doctrine against the Queen's proceedings, *scil* the said act of parliament *de anno primo*, by which the Book of Common Prayer was established, and that he did not mean any such public or violent sedition as has been described, and as *ex vi termini per se* the word itself imports; and it was said, God forbid that a man's words should be by such strict and grammatical construction taken by parcels against the manifest intent of the party upon consideration of all the words, which import the true cause and occasion which manifest the true sense of them; *quia quæ ad unum finem loquuta sunt, non debent ad alium detorqueri*: and therefore in the said case of murder, the court held the (a) justification good; and that the defendant should never be put to the general issue, when he confesses the words and justifies them, or confesses the words, and by special matter shews that they are not actionable. And although he varies from the plaintiff in the sense and quality of the words, yet it is no cause to drive him to the general issue: as in *maintenance*, the plaintiff charges the defendant with unlawful maintenance, the defendant may justify by reason of a lawful maintenance, and may not plead the general issue: wherefore the plaintiff replied and said, *Quod præd' Edwardus Denny dixit propalavit & prædicta verba, &c. de injuria sua propria absque tali causa*, and thereupon issue was joined; & *postea partes concordaverunt*; and this was the first cause that the author of this book (who was of counsel with the defendant) moved in the King's Bench. In this case, reader, you may observe an excellent point of learning in actions for slander, to observe the occasion and cause of speaking of them, and how it may be pleaded in the defendant's excuse. 2. When the matter in fact will clearly serve for your client, although your opinion is that the plaintiff has no cause of action, yet take heed you do not hazard the matter upon a demurrer; in which, upon the pleading, and otherwise, more perhaps will arise than you thought of; but first take advantage of the matters of fact, and leave matters in law, which always arise upon the matters in fact *ad ultimum*, and never at first demur in law, when after trial of the matters in fact, the matters in law (as in this case it was) will be saved to you.

(a) Doct. pla.
21. Antea 13. b.

*in actions of slander
two material points
to be observed,
The occasion &
Cause of speaking
of them - & how
it may be
pleaded in
Defendant's
excuse -*

Doct. pla. 116

Cutler and Dixon.

2.

M. 27 & 28 El.
in B. R. Cutler
& Dixon.

2 Bur. 809 to
813.

(a) 3 Leon. 123.

4 Leon. 35. Noy
102. 1 Bulst.

151, 185. Cro.

El. 230, 231,

248. Cro. Jac.

134, 191, 356.

432. Godb. 240,

340. 2 Bulstr.

269. 1 Rol Rep.

61. Palm. 145,

188, 189. 1 Sand.

132. 2 Sid. 163.

1 Vent. 25. Mo.

143, 820, 821.

2 Inst. 228.

Yelv. 117.

March 76, 77.

3.

M. 33 & 34 El.
Buckley & Wood.
in B. R.

(b) Cro. El. 230,

247, 248. 2 And.

28. Moor 705.

706. 2 Brownl.

100. Hard. 223.

Lane 50.

(c) Cr. El. 230.

Doct. pla. 21, 55.

(d) March 76,

77. Yelv. 117.

2 Inst. 228. Noy

02. Cr. El. 230,

231, 248. Cr.

Jac. 134, 191,

356, 432. 3 Leon.

123. 4 Leon. 35.

1 Bulst. 151,

185. 3 Bulstr.

269. Godb. 240,

340. 1 Rol. Rep.

61. Palm. 145,

188, 189. 1 Sand.

132. 2 Sid. 163.

1 Vent. 25. Moor

267. Cr. El. 248,

2 Inst. 228. Moor

It was adjudged, that if one exhibits articles to Justices of peace against a certain person, containing divers great abuses and misdemeanours, not only concerning the petitioners themselves, but many others, and all this to the intent that he should be bound to his good behaviour; in this case the party accused shall not have for any matter contained in such articles any action upon the case, for they have pursued the (a) ordinary course of Justice in such case: and if actions should be permitted in such cases, those who have just cause of complaint, would not dare to complain for fear of infinite vexation. R. Q. A. 50.

Buckley and Wood.

The case was, that Owen Wood exhibited a bill in the Star-chamber against Sir R. (b) Buckley, and charged him with divers matters examinable in the same court; and further. that he was a maintainer of pirates and murderers, and a procurer of murders and piracies, which offences were not determinable in the Star-chamber: Sir R. Buckley brought an action on the case against Owen Wood, and declared that the said Owen had exhibited the said bill, containing (*inter alia*) that the said Rich. was a maintainer of pirates and murderers, and a procurer of murders and piracies, and that the said Owen at B. in the county of Salop, speaking of the matters contained in the said bill, said in *auditu quamplurimorum*, that the said bill and matters therein contained were true: the defendant confessed the exhibiting of the bill in the Star-chamber, and that he in the said court at Westminster said the said words; *absque hoc* that he spoke the words in the county of Salop, before or after the day mentioned in the declaration, by which he excluded the (c) day itself and answered not to it, for which cause the bar was held insufficient *per totam curiam*. And it was resolved *per totam curiam*, that for any matter contained in the bill that was examinable in the said court, no action lies, although the matter is merely false, because it was in (d) course of justice: and this agrees with the opinion in 11 Eliz. Dyer 285. and with the judgment in Cutler and Dixon's case before. 2. It was resolved and adjudged, that for the said words not (f) examinable in the said court, an action on the case lies, for *that* cannot be in a course of justice; for the court has no power or jurisdiction to do *that* which appertains to justice, nor to punish the said offences, and if such matters may be inserted in bills exhibited in so high and honourable a court, in great slander of the parties, and they cannot answer it to

143, 820, 821. (e) Dyer 285. pl. 37. Kelw. 36, 37, 38. Cro. El. 230. (f) Hob. 836. Cro. Jac. 134, 432. 2 And. 28, 29. 2 Brownl. 100. 1 Rol. 34. Hob. 206. 143, 706. 1 Vent. 25.

to clear themselves, nor have their actions as well to clear themselves of the crimes, as to recover damages for the great injury and wrong done them, great inconvenience will ensue; but the said libel without any remedy given the party will remain always on record, to his shame and infamy which will be full of great inconvenience. Also by the law no murder, or piracy can be tried on any bill exhibited in English, but the offender ought to be indicted for it, and thereupon to have his trial; and therefore he who preferred this bill has not only mistaken the proper court, but the manner and nature of exhibiting the said bill (as to the said clauses) has not any appearance of an ordinary suit in course of justice: but if a man brings an appeal of murder, returnable in C. B. for that no action lies; for although the writ is not returnable before competent judges who can do justice, yet it is in the nature of a lawful suit, namely, by writ of appeal. And afterwards judgment, was given for the plaintiff. And so in the like case, Trin. 21 Eliz. Rot. 561. *inter* Bowes (a) & Standen, it was resolved *per totam curiam* in B. R. in the like case on a bill preferred in the Star-chamber; but the parties agreed and no judgment was entered. And upon the same judgment O. Wood brought a writ of error in the Exchequer-chamber; and there it was resolved that upon the said matter Sir R. Buckley might have had a good action: but in this case, he has not alledged the matter in a sufficient manner, for the action was not grounded upon the bill exhibited at Westminster, but because he said in the county of Salop, *in auditu quamplurimorum*, that his bill was true, without expressing the said matters in particular contained in the bill on which the action was intended to be grounded, so that they who heard only the said words, that his bill was true, could not without saying more, know the said clauses that were slanderous to the plaintiff; and for this cause the judgment was reversed.

6 Mod. 169.
5 Co. 57.

(a) Cro. El.
231, 248. 2
And. 29.

Co. Ent. 24. nu.
21.

Stanhope and Blith.

The plaintiff reciting in his declaration, that whereas he was a Justice of Peace, Surveyor of the duchy of Lancaster, and had divers other offices: the defendant said of him, "M. Stanhope hath but one manor, and *that* he hath "gotten by swearing and forswearing:" and it was adjudged that the said words were not actionable. 1. Because they were too general; and words which shall charge any one with an action, in which damages shall be recovered, ought to have convenient certainty. 2. The defendant doth not charge the plaintiff with swearing or forswearing, for he may

4.
P. 27 El. Stan-
hope Blith in
B. R. Co. Ent.
21. nu. 18. Cro.
El. 192, 603,
888. Winch.
124. 3 Leon.
163.

Skinner. 124.

(a) 1 Rol. 39,
40, 41, 42.
Godb. 340.
Yelv. 27. Cro.
El. 135, 293,
394, 492, 905.
Poph. 211. Noy
34. 1 Bulst. 40.
3 Inst. 166. Hutt.
34, 44. Hob.
283. 1 Brownl.
13. Moor 365,
404. Cro. Jac.
190, 204, 436.
Cro. Car. 288,
337, 378.
Winch. 2 & 3.
1 Leon. 127.
1 Jones 307.
30 H. 8. Br.
Action sur le
Case 104.
(b) 5 Co. 31. a.
73. a.
(c) Hutton 34,
44. Cro. El. 135.
Cro. Jac. 120.
158, 80, 436.
Moor 365. Yelv.
27, 72. 3 Inst.
166. 1 Rol. 39,
40, 42.
(d) Palm. 129.

5.
Eodem Term'
Hext v. Yeomans
in B. R. Poph.
210. Latch. 176.
3 Bulst. 262.
Godb. 340.
(a) 4 Co. 13. a.
20. a. Godb. 278.
Postea 17. b.
Poph. 211.
1 Rol. 71, 72,
73. 1 Mod. Rep.
19, 23. Hutt. 38,
65, 113.
(b) Poph. 210.
Latch. 176.
3 Bulst. 262.
Godb. 340.

may recover or get a manor by swearing and forswearing, and yet he was not procuring or assenting to it; and words which maintain an action ought to be directly applied to the plaintiff, and not by collection or inference; for the damages ought to be given to the plaintiff, in regard to the damage which he has by the scandal. 3. If one charges another that he has (a) forsworn himself, it is not actionable for two reasons. 1. Because he may be forsworn in common conversation, *quia benignior sententia in verbis generalibus seu dubiis est praeferenda*. 2. It is an usual word of passion and anger for one to say, that another has forsworn himself; as if one says of another, that he is a villain, or a rogue, or a varlet, *vel familia*, these or such like will not maintain an action, for (b) *boni judicis est lites dirimere*: but if one says of another, that he is (c) perjured, or that he has forsworn himself in such a court, for such words an action shall be maintained; for by these words it appears that he has forsworn himself in a judicial proceeding; *sed haec ita in promptu sunt, ut res probatione non egeant*. For all these cases have been often adjudged. And Wray Chief Justice said, that although slanders and false imputations are to be suppressed, because many times a (d) *verbis ad verbera perventum est*: yet he said, that the Judges had resolved, that actions for scandals should not be maintained by any strained construction or argument, nor any favour given to support them, forasmuch as in these days they more abound than in times past, and the intemperance and malice of men increase; *et malitiis hominum est obviandum*: and in our books *actiones pro scandalis sunt rarissime*; and such which are brought, are for words of eminent slanders and of great import.

Hext against Yeomans.

Yeomans charged Hext, then being a Justice of Peace; "For my ground in Allerton, Hext seeks my life, and if I could find John Silver, I do not doubt but within two days to arrest Hext for suspicion of felony;" and it was adjudged, that for the first part of the words, "That for my ground in Allerton, Hext seeks my life," no action lay for two reasons, 1. Because he may "seek his life" lawfully upon just cause, and his land may be held of him, and so in (a) *mitiore sensu*. 2. Seeking of his life is too general, and for seeking *tantum* no punishment is inflicted by the law: but for the (b) latter words it was adjudged, that the action lay, because for suspicion of felony he shall be imprisoned, and his life drawn in question.

Byrchley

Byrchley's Case.

Byrchley being one of the attornies or clerks of B. R. and sworn to deal duly without corruption in his office; the defendant speaking of the manner of Byrchley's dealing in his profession, said to Byrchley, "you are well known to be a corrupt man, and to deal corruptly." 1. It was resolved that the said words *ex causa dicendi* imply that Byrchley had dealt corruptly in his profession: also it was said, *quod sermo relatus ad personam, intelligi debet de (b) conditione personæ*. And the plaintiff had judgment for two reasons. 1. Because the said scandal touches the plaintiff in his said oath. 2. The said words scandalize him in the duty of his profession, by which he gets his living. Skinner a merchant of London said of Manwood Chief Baron. "That he was a (c) corrupt Judge;" and it was adjudged that the words were actionable, *vide* 4 E. 6. *Action sur le Case* 112. But it was resolved in the principal case, that if the precedent speech had been, that Byrchley was an usurer, or that he was another's executor, and would not perform the will, &c. and thereupon the defendant had spoke the said words, then no action would be maintainable for them, which agree with the resolution in the Lord Cromwel's Case.

Stuckley and Bulhead.

Stuckley (d) Justice of Peace in the county of Devon, brought an action on the case against Bulhead for these words; "M. Stuckley covereth and hideth felonies, and is not worthy to be a Justice of Peace:" and adjudged, that the action lies, for it is against his oath and the office of a Justice of Peace, and a good cause to put him out of the commission, and he may be indicted and fined for it.

Weaver and Cariden.

The defendant said, that the plaintiff was (e) detected for perjury in the Star Chamber; and adjudged, that no action lay: for an honest man may be detected, but not convicted; and every one who has a bill of perjury exhibited against him there, is detected.

Snag against Gee.

The plaintiff shewed in his declaration, that the defendant had a wife yet living, and that the defendant said of the plaintiff, "thou hast killed my (f) wife, thou art a traitor." And as to these words, "thou hast killed my wife," the defendant demurred in law; and it was adjudged, that no action lay; and the difference taken when the wife was living (as in this case it appeared she was) and when she was dead; for when she is alive no action lies, although the defendant says, that the plaintiff has murdered her; for then it appears that no murder of her can be committed, nor the defendant in any jeopardy, and so the words vain, and no scandal or damage to the plaintiff.

6.

M. 27 & 28. El.
In B. R. Byrch-
ley's Case.

(a) 1 Leon.
336. Hob. 9.
Winch. 40.
1 Bulstr. 134.
Poph. 177.
3 Bulstr. 266.
Cr. Car. 15.
490. 2 Rolles Rep.
72, 149. Hetl.
123, 160, 161.
Cr. Eliz. 358.
Hutt. 104.
(b) Cr. El. 192.
Cr. Car. 192.
Godb. 278. Hutt.
104. 1 Ventr.
50. Antea 13, 14.
(c) Postea 19. a.
1 Ventr. 50.
Poph. 177. 1 Mod.
Rep. 23. 2 Rolles
Rep. 136.
Skinner 98.

7.

M. 44. & 45. El.
In C. B. Stuckley
& Bulhead.
(d) Cr. Car. 15.
1 Ventr. 50.
1 Mod. Rep. 23.
Cr. Jac. 56.
Hetl. 161.

8.

Hil 37. El. Wea-
ver & Cariden.
(e) Cr. El. 371.
Cr. Car. 268.
Hutt. 2. 2 Rol.
Rep. 142.

9.

H. 39 El. In C. B.
Snag v. Gee.
(f) Cr. Car.
489. Poph. 187.
1 Jones 141.
Litch. 159, 160.
Winch. 39, 40.
3 Bulstr. 167.
Patm. 358.
March 109.

Eaton against Allen.

10.
Tr. 40 El. In
C. B. Eaton v.
Allen
(a) Cr. Car.
140. Cr. Eliz.
684.
(b) Cr. El. 49.
Moor 419.
2 Bulst. 206.
3 Bulst. 167.
Lane 98.
(c) Cr. Eliz.
191. 3 Bulst.
167.
(d) Mocr 142.
1 Leon. 187.
2 Siderf. 22, 31.
1 Anderf. 121.
(e) Postea 19. b.
Cr. Car. 140.
1 Jones 195.
1 Siderf. 231.

The defendant said of the plaintiff, " he is (a) a brabler " and a quarreller, for he gave his companion counsel to make " a deed of gift of his goods, to kill me, and then to fly out " of the country, but God preserved me." And it was strongly urged that the action should be maintainable, and divers cases cited; one of the Lady (b) Cockeyn, M. 32 & 33 El. in B. R. for these words, " my Lady Cockeyn offered to give " poison to one to kill the child in her body." Another *inter* Tibots & Heyn in Gloucester for these words, " (c) Tibots " and another did agree to hire one to kill S. B." Also Cardinal's case, for these words, " if I had consented to M. Cardinal, T. H. had not been alive:" and the Lord Lumley's case; " my Lord Lumley (d) hath gone about to take away " my life against all Christian dealing." But upon great consideration and advisement it was adjudged that in the principal case the words were not actionable: for the purpose or (e) intent of a man without act is not punishable by law. *et ubi non est lex, ibi non est transgressio quoad mundum.* And although for such conspiracy he might be punished in the Star Chamber, that is by the absolute power of the court, and not by the ordinary course of the law. *Nota bene*, this case, and the cause and reason of this judgment.

Davis against Gardiner.

11.
Tr. 35 El. Davis
v. Gardiner.
Poph. 36.
1 Rolles Rep. 34,
35, 119. Moor
409. Cr. Car.
141, 155. Cr.
Jac. 323. 2 Bulst.
89, 90. 1 Siderf.
397. 1 Jones 141.
2 Siderf. 172.
Latch. 218.
2 Rolles Rep.
249. Poph. 140.
Hertl. 161.
6 Mod. 104, 105.
This Case denied
to be law, Salk.
694.
Cro. Jac. 323. Cr.
Eliz. 6:9.
1 Ventr. 4.

The plaintiff declared, that she was a virgin of good fame, &c. and free from all suspicion of incontinency, &c. And whereas Anthony Elcock citizen and mercer of London, of the substance and value of 3000l. desired her for his wife, and had thereupon conferred with John Davis her father, and was ready to conclude it, the defendant (*præmissorum non ignarus*) to defame the said Anne, and to obstruct the said Anthony's proceeding, uttered and published of the said Anne these words; " I know Davis's daughter well (*innuendo præd' Anna*) she dwelt in Cheapside, and there was a grocer that " did get her with child (and the defendant being there then admonished that he should be advised *quid dixerat de præfata Anna*;) *ulterius de eadem dixit*: " I know very well what I say, " I know her father, and mother, and sister, and she is the " youngest sister; and had the child by the grocer:" by reason of which words the the plaintiff was greatly defamed, & *ratione inde dict' Anthonius ipsam Annam in uxor' ducere penitus recusabat*; and the defendant pleaded not guilty, and by *nisi prius* in the county of Bucks, the jurors found for the plaintiff, and assessed damages to 200 marks. And it was now moved in arrest of judgment by the defendant's counsel, that the said defamation of incontinency concerned the spiritual, and not the temporal jurisdiction: and therefore as the offence should be punished in the Spiritual Court, so her remedy for such defamation should be there also; *for cognitio causæ non spectat ad forum regium*: so if a man

Skinner 112.
Post. 20.

man is called bastard, or heretic, or miscreant, or adulterer, (so far as these belong to the (a) ecclesiastical jurisdiction) no action lies at the common law; and in proof thereof 12 H. 7. 22. a. b. & 27 H. 8. 14. a. b. were cited. But it was answered by the plaintiff's counsel, and resolved *per totam curiam*, that the action was (b) maintainable for two reasons. 1. Because if the woman had a bastard, she was * punishable by the statute of 18 Eliz. cap. 3. And although fornication or adultery is not examinable by our law, because they are done in secret, and peradventure are indecent to be openly examined, yet the having of a bastard is a thing apparent, and examinable and punishable by the said act. 2. It was resolved, if the defendant had charged the plaintiff with bare incontinency, yet the action should be maintainable: for in this case the ground of the action is (c) temporal, *sc.* that she was to be advanced in marriage, and that she was defeated of it, and the means by which she was defeated was the said slander, which means tending to such end, shall be tried by the common law. So if a divine is to be presented to a benefice, and one to defeat him of it, says to the patron, "that he is an heretic, or a bastard, or that he is excommunicated," by which the patron refuses to present him (as he well might if the imputations were true) and he loses his preferment, he shall have his action on the case for those slanders tending to such end. And if a woman is bound that she shall live continent and chaste; or if a lease is made to her *quamdiu* (d) *casta vixerit*, in these cases incontinency shall be tried by the common law. And Popham, Chief Justice, said, that if one says of a woman that keeps an (e) inn, that she has a great infectious disease, by which she loses her guests, she shall have an action on the case. Trin. 25 Eliz. in B. R. inter Banister & Banister, it was resolved, that where the defendant said of the plaintiff (being son and heir to his father) that he was a (f) bastard, that an action on the case lies; for it tends to his disinherison of the land which descends to him from his father: but there it was resolved, that if the defendant pretends that the plaintiff was a bastard, and that he (g) himself was the next heir, there no action lies, and that the defendant may shew by way of bar, if the plaintiff omits it in his declaration; which agrees with the resolution in Anne Davis's case, and with the Lord Cromwel's case.

James *versus* Rutlech.

The plaintiff declared, that the defendant and one John Bonner having conference of the plaintiff, the defendant said of the plaintiff to the said John Bonner these words, "hang him (*prædictum Johannem James innuendo*) "he is full of the pox (*innuendo* the French (a) pox) I marvel that you (*prædictum Johannem Bonner innuendo*) will eat

Q 2

" or

Skinner 112.
(a) 1 Brownl. 16.
Moor 10, 29.
Cr. Eliz. 787.
Godb. 327, 328.
(b) Cr. Eliz.
639, 787.
* Cart. 55.
Palm. 298.
Nothing of this reason was offered in this case, as Justice Jones affirmed to Twifden, 1 Vent. 4.
(c) Cr. Car. 141, 155.
Cr. Jac. 323, 642
Palm. 298.
1 Rolles 35.
Cart. 234, 235.
3 Keb. 148.
5 Co. 58. a.
Hettl. 161.
(d) 1 Sid. 214.
(e) 2 Rolles Rep. 136. Cr. El. 289, 582, 583.
(f) 1 Rolles Rep. 244.
2 Rolles Rep. 250.
Cr. Jac. 422.
Cr. Car. 469.
1 Jones 388.
Hob. 179.
Godb. 451.
Owen 32.
Dall. 63.
3 Bulstr. 75.
1 Rolles 38.
Cr. El. 346, 347.
(g) Postea 18. a.
Yelv. 88, 89.
1 Sider. 79.
Cr. Jac. 164.
Moor 188.
Cr. Eliz. 197.
12.
M. 41 & 42 El.
in B. R. James
versus Rutlech.
Mod. 573.
1 Rolles 67.
Stiles 206.
(a) Cr. El. 289.
Cr. Jac. 430.
Palm. 64, 65.

" or drink with him, (*prædictum Johannem James innuendo*) " I will prove that he is full of the pox (*innuendo* the French pox.)" The defendant pleaded, not guilty; and it was found for the plaintiff, and damages assessed. And it was moved in arrest of judgment, that the words were not actionable: and it was resolved, that in every action on the case for slanderous words, two things are requisite; 1. That the person who is scandalized, is (*a*) certain. 2. That the scandal is apparent by the words themselves; and therefore, if one says without any precedent communication, that one of the servants of J. S. (he having many) is a notorious felon, or traitor, &c. here, for the uncertainty of the person no action lies; and an (*b*) *innuendo* cannot make it certain. So if one says generally, " I know one near about J. S. that is a notorious thief," or such like; but when the person is once named in certain, as if two speaking together of J. S. one says, " He is a notorious thief," there J. S. in his declaration may shew that there was speech of him between them two, and that one said of him, " he (*innuendo prædicti* J. S.) is a notorious thief." For the office of an *innuendo* is to contain and design the same person who was named in certain before, and in effect stands in lieu of a *prædicti*, but an *innuendo* cannot make a person certain who was uncertain before. For it would be inconvenient, that actions should be maintained by imagination of an intent which doth not appear by the words upon which the action is grounded, but is altogether uncertain and subject to deceivable conjecture: but if one says to J. S. " Thou art a " (*c*) traitor, &c." there *constat de persona*, and the action lies: so here in the case at bar, when the defendant and Bonner had speech of the plaintiff, then, when the defendant said, " hang him, &c." there *innuendo* will denote the same person named before: but if the defendant without any discourse of the plaintiff, had said, " hang him, &c." there no *innuendo* would have made the person certain. As to the 2d, as an *innuendo* cannot make the person certain which was uncertain before, so an *innuendo* cannot alter the matter or sense of the words themselves: and therefore when the defendant in the case at bar said of the plaintiff, " that he was full of the pox, (*innuendo* the French pox,)" this *innuendo* doth not do its proper office, for it endeavours to extend the general words, the pox, to the French pox, by imagination of an intent which is not apparent by any precedent words, to which the *innuendo* should refer. And the words themselves shall be taken in (*d*) *mitiori sensu*. Carthew 422.

(a) Moor 63.

(b) 1 Sid. 52.
March. 109. 110.
2 Rolles Rep. 145.
Cr. Car. 236,
243, 443.
3 Bulstr. 72, 73.
3 Rolles Rep. 227.
Hutt. 65.
Cr. Jac. 241,
126, 107, 514.
Cr. El. 497.
Hob. 2, 3, 45, 268.
Aley 32.
Styles 46.
Yelv. 21.
Hutt. 65.
1 Rol. 82, 83, 84.
Herl. 174.
2 Cases in Law,
&c. 197.
Post 20. a.
(c) 10 Co. 130. b.

(d) Antea 13. a.
15. b.
4 Co. 20. a.
Godb. 278.
Poph. 211.
Hutt. 38, 65, 113.
1 Rol. 71, 72, 73.
Latch. 2.
Palm. 29.
3 Bulstr. 74.

Oxford & Ux. *versus* Crofs.

The plaintiff brought an action in London, because the defendant called the plaintiff's wife (a) whore; and the defendant removed it into B. R. by *habeas corpus*, and it was moved to have a *procedendo* to remand it, because the action was maintainable in London for the said words, but not at the common law. And the *procedendo* was denied *per tot' cur'*. For such custom to maintain actions for such brabbling words is against law; *licet (b) consuetudo sit magnæ autoritatis, nunquam tamen præjudicat manifestæ veritati.*

Sir G. Gerard *versus* Mary Dickenson.

The plaintiff declared that he was seised of the manor and castle of H. in the county of Stafford in fee by purchase from George Lord Audley; and that he was in (a) communication to demise the said castle and manor to Ralph Egerton for 22 years for 200l. fine, and 100l. rent *per annum*; and that the defendant (*præmissorum non ignara*) said, "I have a lease of the manor and castle of H. for 90 years;" and then and there shewed and published a demise supposed to be made by George Lord Audley, grandfather to the said George Lord Audley, for ninety years, to Edward Dickenson her husband, and published the said demise as a true and good lease; and so affirmed it, and offered to sell it; *ubi re vera* the said lease was counterfeited by her husband, and that the defendant knew it to be counterfeited; by reason of which words and publication, the said Ralph Egerton did not proceed to accept the said lease, to damage, &c. The defendant pleaded in bar, *quod (b) talis indentura (qualis in the declaration is alledged) came to the defendant's hands by trover, and traversed that she knew of the forgery, upon which the plaintiff demurred in law.* And in this case three points were resolved. 1. If the defendant had affirmed and published, that the plaintiff had no right to the castle and manor of H. but that she herself had right to them, in that case, because the defendant herself (c) pretends right to them, although in truth she had none, yet no action lies. For if an action should lie when the defendant herself claims an interest, how can any make claim or title to any land, or begin any suit, or seek advice and counsel, but he should be subject to an action, which would be inconvenient. Which resolution agrees with the opinion in (d) Banister's Case before, (e) 2 E. 4. 5. b. &c. (f) 15 E. 4. 32. a. b. no action upon the case lies against one who publishes another to be his (g) villain, without saying that he lies in wait to imprison him, *et tales & tantas minas in ipsum fecit, quod circa negotia sua palam intendere non audebat.* Vide 22 E. 3. 1. in (b) Conspiracy, 38 E. 3.

13.

Tr. 41 El. Oxford & Ux. v. Crofs.

(a) 1 Rolles 550.
2 Rolles 69.
March. 107.
Cr. Car. 141, 350,
394, 486, 487.
Cr. El. 282, 283.
Lit. Rep. 10.
(b) Stiles 69, 70,
229, 245.
6 Co. 6. b.

14.

M. 32 & 33. El.
Sir G. Gerard Kt.
Master of the
Rolls, v. Dick-
enson.
(a) Yelv. 89.
Cr. Car. 140, 141.
Cr. Jac. 397,
308, 485.
1 Rolles Rep. 244.
3 Bullstr. 75.
Palm. 529.
Cr. El. 196.

(b) Postea 18. b.
Cr. El. 196, 197.
Lane 62.

(c) 1 Rolles Rep.
409. 1 Sid. 79.
Cr. Jac. 164.
Moor 188.
Cr. El. 197.
Antea 17. a.
Hob. 205.
Hettl. 161, 162.
(d) Supra 17. a.
(e) Fitz. Action
sur le Case 16.
Br. Action sur
le Case 90.
(f) Br. Action
sur le Case 63.
Br. Villenage 75.
(g) Cr. El. 197.
Kelw. 26. b. 40. a.
(b) Cr. El. 197.

33. 43 E. 3. 20 F. N. B. 116. b. And therefore it was resolved, that for the said words, "I have a lease of the manor of H. for 90 years," although it is false, yet no action lies for slandering of his title or interest in the said castle and manor. And although it appears by the defendant's bar, that she has no title or interest in the said lease, but is a stranger to it; yet forasmuch as the matter alledged in the declaration doth not maintain the action, the (a) bar will not make it good.

(a) Doct. pl. 69.

2. It was resolved, that there was other matter in the declaration sufficient to maintain the action; and that was because it was alledged in the declaration that the defendant knew of the communication of the making of the said lease to Ralph Eger-ton, and also that she knew that the lease was forged and counterfeited, and yet (against her own knowledge) she has affirmed and published, that it was a good and true lease, by which the plaintiff was defeated of his bargain. *Vide* 5 E. 4. 126.

(b) Hob. 267.
Cr. Eliz. 197.
Fitzgib. 98, 174.

If a man (b) forges a bond in my name, and puts it in suit against me, by which I am vexed and damnified, I shall have an action on the case, 42 Aff. 8. B. offered eight oxen to sell to A. as his (c) proper goods, knowing them to be the proper goods of P. A. trusting in the fidelity of B. bought them for 8l. and afterwards P. retook the oxen; in that case A. shall have an action upon the case against B. 3. It was resolved, that the bar was insufficient, for the defendant's knowing of the forgery is not traversable. As in an action upon the case, because the * defendant's dog has bit the plaintiff's cattle, *ipse sciens canem suum ad mordendas oves consuetum*; the (d) (*sciens*) is not traversable, but ought to be proved in evidence upon the general issue, for *sciens*, &c. is no direct allegation, nor ever alledged in any place, so that it is not traversable nor triable. Also the manner of pleading, (e) *talis indentura qualis* in the declaration is alledged, is no direct answer to the indenture alledged in the declaration, for *talis indentura non est eadem indentura*; for *nullum simile est idem*. *Vide* 30 Aff. 19. 2 E. 4. 5. 15 E. 4. 32. 27 H. 8. 14. 22. 30 H. 8. Br. Action sur le Case 104. 4 E. 6. *ibid.* 112. 28 H. 8. Dyer 19. 6 E. 6. *ibid.* 72. & 75. 3 Mar. *ibid.* 118. 7 Eliz. *ibid.* 236. 11 Eliz. 285. 15 Eliz. 317. And these are in effect all the cases in our books.

* Fitzgib. 263.
(d) Cr. Jac. 398,
469. 1 Rolles 4.
Cr. Car. 254,
487. 3 Bulst. 76.
28 H. 6. 7. a.
Br. Travers per-
sans ceo 20.
Doct. pl. 189.
Hard. 2.
1 Siderf. 21.
2 Bulst. 291.
1 Rol. Rep. 43,
70, 119.
(e) Cr. Eliz. 169,
197. Doct. pl. 56.
Lane 62.

Bittridge's Case.

15.
M. 44 & 45 El.
in B. R. Bit-
tridge's Case.
Yelv. 10. 34.
2 Rol. Rep. 343.
Moor 666.

Bittridge brought an action upon the case for these words, "Mr. Bittridge is a perjured old knave, and that is to be proved by a stake parting the land of H. Martin and Mr. Wright." The def. pleaded not guilty, and was found guilty;

guilty: and now in arrest of judgment it was moved, that these words are not (a) actionable. 1. Because this word, "a perjured old knave," the noun is knave, and perjured is spoke adjectively; as if a man says, one is a seditious or thievish knave, these words are not actionable, because the words do no import that he hath made sedition or felony, but are adjective, which imply an inclination to it. 2. That the court ought to judge upon all the words together, and collect the defendant's intention upon all his words, and not to take his words by parcels. And it was said that (b) the last words extenuate the genuine and proper sense of the first words, for perjury shall be intended in some court upon judicial proceeding; but when he adds, "and that is to be proved by a stake parting, &c." that explains for any thing that appears to the court, that this perjury was not in any court, but an unadvised oath extrajudicial about the placing of a stake for a partition. As to the first it was resolved by Popham, Chief Justice, Gawdy, Fenner, and Yelverton Justices, that for these words, "thou art a perjured knave," without any more, an action upon the case lies, for sometimes adjective words will maintain an action, and sometimes not. They are actionable, 1. When the adjective presumes an act committed. 2. When they scandalize one in his office, or function, or trade, by which he gets his living: as if a man says, that one is "a perjured knave," there must be an act done, or otherwise he cannot be perjured, as was resolved before: so if one says of an officer, or a judge, that he is a (c) corrupt officer or judge, an action lies for both causes; 1. Because it implies an act done: 2. It is slanderous to him in respect of his office. *Pasch. 24 Eliz. in B. R. Philips. Bachelor of Divinity, and Parson of D. brought an action upon the case against Robert Badby, Esq. because the same defendant spoke these words in London, "thou hast made a seditious sermon, and moved the people to sedition this day." The defendant justified at St. Edmund's-Bury in Suffolk, that he spake the said words at Bury, upon which the plaintiff demurred; and in that case two points were resolved. 1. Notwithstanding that the first part of the words were uttered adjectively, and the latter words were but moving to sedition, and it did not appear that any followed, yet because they scandalized the plaintiff in his function, it was resolved that the words were actionable. 2. That the defendant ought to have justified the words in London, and not at Bury, for the words in the declaration were not answered; wherefore judgment was given for the plaintiff. So if one says of a merchant, that he is a "bankruptly knave, or bankrupt knave," altho' there (d) bankrupt be spoken adjectively,*

(a) Cr. Jac. 81.
Palm. 11.

(b) Stiles 379^a

(c) Supra 16. a.
1 Vent. 50.
Poph. 177.
Mod. Rep. 23.
2 Rolles Rep. 136.
Pasch. 24 Eliz.
inter Philips &
Badby in B. R.

(d) Cro. Jac. 345,
585.
1 Rolles 17.
Cr. Car. 31, 472.
1 Rol. Rep. 22.
2 Bulstr. 210.
Palm. 10, 11.
Godh. 151.
Cr. El. 268, 911.

(a) 2 Rol. Rep.
145: 433.

(b) Latch. 47.
1 Sid. 373.
Palm. 11.
Cr. Jac. 65, 66.
(c) Antea 15. b.
Cr. Car. 149.
1 Jones 195.
1 Sid. 231.
Yelver. 90.

Goldb. 247.
Cro. Jac. 39.
Hutt. 113.
Cr. Jac. 674.
3 Inst. 109.

adjectively, yet an action lies, as it was adjudged in Mitton's Case, in C. B. Mich. 43 & 44 Eliz. Or if one says of a merchant, "that he (a) will be bankrupt in two days," which implies but inclination, yet an action lies, 6 E. 6. Dyer 72: for *that* defames him in his trade by which he gets his living: but when the words do not imply an act done, but an inclination to an act which doth not scandalize the party in the duty of any office or function nor in his trade of living, there an action upon the case doth not lie; as to say that he is a "fe-
"ditious or (b) thievish knave," these do not import any act to be done, but an (c) intent or inclination to it, which is not punishable by the common law. As to the second, it was resolved in the case of Bittidge, that upon all the words taken together no action lay; for the latter words extenuate the first, and explain his intent, that he did not intend any judicial perjury. Also it's impossible that a stake can prove him perjured: and therefore upon consideration of all the words for the impossibility and insensibility of them, they are not actionable, as it has been adjudged, that where one says to another, "thou art a thief, for thou hast stolen my apples out of my
"orchard;" or, "for thou hast robbed my hop-ground," which latter words prove it no felony; and so qualify the proper sense of this word thief, which of itself, although it is generally spoken will bear an action. And so it was adjudged *inter* Dobbins & Franklin, Mich. 43 & 44 Eliz. in C. B. And it was agreed that it is all one to say, "thou art a thief, for
"thou hast stolen my apples out of my orchard;" and to say, "thou art a thief, and that will be proved by stealing my ap-
"ples in my orchard." So in the case at bar, "thou art a
"perjured old knave, and that will be proved by a stake part-
"ing, &c." For the office of Judges is upon consideration of all the words to collect the true scope and intention of him who speaks them: and if in this case the plaintiff had declared only upon the first words, *sc.* "thou art a perjured knave," the defendant might have shewed all the words, and the coherence of them, as appears before in the Lord Cromwel's case. But it was said, that if the plaintiff's counsel had disclosed the truth of the case in the declaration, the said words would have well maintained the action; for the truth of the case was, that in an action between Martin and Wright, the state of the controversy was, whether the said stake stood upon the land of the one, or of the other, or indifferently, as a boundary betwixt them. And in that action the plaintiff was sworn as a witness, and by the pretence of the defendant, had in his deposition perjured himself: but this special matter was not shewed, and therefore it was adjudged, *quod querens nihil capiat per billam.*

Barham's

Barham's case.

Barham brought (a) an action on the case against Netherfal, and the words were, "Master Barham did burn my barn" (*innuendo* a barn with corn) with his own hands, and none "but he;" and after verdict, it was moved in arrest of judgment, that the words were not actionable, for it is not felony (b) to burn a barn if it is not parcel of a mansion-house, nor full of corn: and in such case *agitur civiliter* and not *criminally*, *et verba accipienda sunt in (c) mitiore sensu*: and the (d) *innuendo* will not serve when the words themselves are not slanderous; which well agrees with divers of the resolutions before.

Palmer and Thorpe.

Touching defamations determinable in the ecclesiastical court, it was resolved, that such defamation ought to have three incidents: 1. That it concerns matter merely spiritual and determinable in the Ecclesiastical Court, as for calling him "heretic, schismatic, adulterer, fornicator, &c." 2. It ought to concern matter merely spiritual only, for if such defamation touches or concerns any thing determinable at the common law, the ecclesiastical Judge shall not have consens of it. 3. Although such defamation is merely spiritual, and only spiritual; yet he who is defamed cannot sue there for amends or damages, but the suit ought to be only for the punishment of the sin, *pro salute animæ*. And as to the first and second, the case in 22 E. 4. 20. a. b. was cited to this effect: the Abbot of St. Alban's sent his servant to a feme-covert to come to his master and speak with him, the servant performed his command, and thereupon the woman came with him to the Abbot; and when the Abbot and the woman were together, the servant (who knew his master's will) withdrew from them, and left them two in the chamber alone; and then the Abbot said to the woman, that her apparel was gross apparel; to whom the woman said, that her apparel was according to her ability, and according to the ability of her husband: the Abbot (knowing in what women repose delight) said to her, that if she would be ruled by him, that she should have as good apparel as any woman in the parish, and solicited her chastity: when the woman would not consent to him, the Abbot assaulted her, and would have made her an ill woman against her will, which she would not suffer; whereupon the Abbot kept her in his chamber against her will, and to the intent, &c. The husband having notice of this abuse to his wife, spoke of all this matter, and said, that he would have his action of false imprisonment against the Abbot, for that he had imprisoned his wife: whereupon the Abbot (adding one sin to another) sued the innocent and poor husband for defamation in the spiritual court, because the husband had published, that the Lord Abbot had solicited his wife's chastity, and would have made her an ill wo-

man:

16.

Salk. 513. M.
44 & 45 Eliz.
in B. R.
Barham's Case.
(a) Co. Entr. 24.
Numb. 22.
Cr. El. 834.
1 Rol. 73. 82.
Yelv. 21.
Noy 155.
Hutt. 65.
Cr. Jac. 438.
1 Sid. 52.
3 Bulstr. 83.
(b) Stamf. Cor.
36. a.
11 H. 7. v. b.
Br. Corone 226.
Hales Pl. Cor.
85, 86.
3 H. 7. 10. a.
11 Co. 29. a.
2 Inst. 188.
Cr. Car. 376, 377.
1 Jones 351.
3 Inst. 66, 67.
Cr. El. 834.
10 E. 4. 14. b.
49 H. 6. 14. b.
in lib. E. 4.
(c) Antea 17. b.
13. a. 15. b.
Godb. 278.
Poph. 211.
Hutt. 38, 65, 113.
1 Rol. 71, 72, 73.
1 Mod. Rep. 19.
23. Larch. 2.
Palm. 29.
3 Bulstr. 74.
(d) Antea 17. b.
1 Siderf. 52.
March 109, 110.
2 Rol. Rep. 145.
Cr. Car. 236,
243, 443.
3 Bulstr. 72, 83.
1 Rol. Rep. 227.
Hutt. 65.
Cr. Jac. 107, 126,
241, 514.
Cr. El. 497.
Hob 2, 3, 45, 268.
Allen 32. Stil. 46.
Yelv. 21.
1 Rol. 82, 83, 84.
Hett. 174.
17.
T. 25 El. in B. R.
Palmer and
Thorpe.
2 Inst. 492.
27 H. 3. 14. b.
Cr. Car. 229.
Cr. Jac. 462.
5 Co. 51. a.
Davis 73. a.
Br. Prohib. 14.

See Rep. Q. A.
209. No difference between scandal of a clergyman and a layman.
And Lucas 385.
That no action lies at common law for calling whore, bawd, &c.

2 Inst. 487, 488, &c.

man : but upon all this matter disclosed to the court, the husband had a prohibition, because the husband might have an action at the common law for this assault and imprisonment of his wife, although he then had no action, nor perhaps never would ; yet because the scandal determinable in the ecclesiastical court, was upon the matter disclosed, mixed with matter determinable at the common law, for this cause, upon a motion made by the Abbot's counsel to have a "consultation" in that case, it was denied by the court. *Vide* 18 E. 4. 6. 12 H. 7. 22. Regist. 46, 47, & 54. As to the third, *vide* the stat. of *articuli cleri*, cap. 1, 2, & 3, and the statute of *circumspēcte agatis*, anno 13 E. 1. and F. N. B. 51. J. K. 52. D. M. 53. A. F. So it appears there, if a Parson sues in the spiritual court for laying violent hands upon him, and to have him excommunicated, or have corporal punishment, and not for damages or amends ; but the plaintiff shall recover costs there : and if the defendant in case of defamation is put to corporal punishment, or for laying violent hands upon clerks, &c. if the party will redeem his penance, and agree to pay the party damnified a certain sum of money, it appears there, that the party damnified shall have suit for this in the spiritual court, and no prohibition lies ; and upon these differences you will better understand the better opinion in 12 H. 7. 22. and the sense of the Regist. 54. where all the Justices refused to grant a consultation in case of defamation, *id est*, either because the matter of the defamation was not merely and solely spiritual, or that the plaintiff sued for damages or amends for such defamation ; and therewith agrees F. N. B. 53. f.

These resolutions concerning scandals (which I amongst many others for my private instruction have observed) at the importunate request and desire of my good friends, some in the realm of Ireland, and others dwelling in the remote parts of England, out of the meridian of Westminster, I have reported, but in a summary and succinct manner, as you see, omitting many others which I do not think necessary to be published, my opinion always being, *quod multo utilius est pauca idonea effundere, quam multis inutilibus homines gravari*. And nevertheless these brief resolutions, and the reason of them being well understood, and observed, will, peradventure give great direction and instruction *pro multis aliis*, and will deter men, for words which are but wind, from subjecting themselves to actions, in which damages and costs are to be recovered, which sometimes trench to the great hindrance and impoverishment of the speakers.

Copyhold Cafes.

See Rep. Q. A:
99.

B R O W N ' s Cafe.

COPYHOLDER in fee by licence made a lease for years, the lessee entered; the copyholder having issue a son and a daughter by one venter, and a son by another, died; the eldest son died before admittance; it was adjudged, that the land should descend to the daughter of the whole blood. And in this case three points were resolved *per totam curiam*.

1. Although a copyholder has in judgment of law but an estate at will, (a) yet custom has so established and fixed his estate, that by the custom of the manor it is descendible, and his heirs shall inherit it, and therefore his estate is not merely *ad voluntatem domini*, but *ad voluntatem domini secundum consuetudinem manerii*: so that the custom of the manor is the (b) soul and life of copyhold estates, for without custom, or if they break their custom, they are subject to the lord's will; and by custom a copyholder is as well inheritable to have his land according to the custom, as he who has freehold at the common law, for (c) *consuetudo est altera lex*: custom and usage from time whereof, &c. may create and consolidate inheritances; for (d) *consuetudo vincit communem legem*. And copyhold estates are of great antiquity, for || Bracton who wrote in the time of the reign of K. H. 3. writes of them, lib. 2. cap. 8. where he says, *Si ipse ad alium transferre voluerit, prius illud restituat domino, vel servienti (id est seneschallo manerii) dominus præsens non fuerit; & de manibus illorum fiat translatio ad alium, &c. quia ille non habet potestatem transferendi, cum liberum tenementum non habeat. Et eodem libro folio 76. Et semper in hujusmodi socagiis consuetudo loci est observanda. Anno 4 E. 1. (who was the son of H. 3.) by the stat. called (e) *Extenta manerii*, there it is said, *inquirend' est de liberis tenentibus quibuscunque, &c. Inquirend' est etiam de custumariis, viz. Quot sunt custumarii, & quantum terræ quilibet**

Brown's case.
M.23 & 24 Eliz.
in C. B.
Moor 125, 126.
1 Léon 2.
3 Wilfon 526.

1st Point.

(a) 3 Co. 8. a.
Lit. sect. 77.
9 Co. 105. b.
6 Co. 37. b.
Cr. Car. 45.
Hetl. 6.
Post. 24. b.
Co. Lit. 60. b.
8 Co. 64. a.
2 Co. 17. a.
Moor 60, 61.
Yelver. 223.
(b) Hetly 6,
Post. 23. b.
(c) Co. Lit. 58. b.
Carth. 42.
(d) Co. Lit. 33. b.
|| Postea 24. b.
Co. Lit. 59. a.
Bract. lib. 2. c. 8.

(e) Co. Lit. 58. a.

quilibet custumarius teneat, quæ opera, quas consuetud' faciat, & quant' opera & consuetud' cujuslib' custum' valeant per ann' & quant' reddit' de reddit' assise per ann', præter opera & consuetud' quæ possunt talliari, & que non ad voluntat' domini. By which it appears, that the whole parliament esteemed of them as of customary tenants; 2. That their rent is accounted parcel of the rent of assise. 3. That some of their customs within some manors are arbitrary at the lord's will, (a) as fines incertain, &c. and within some manors their customs are certain, and all that as custom has allowed.

(a) Co. Lit. 59. b.
60. a.
Postea 27. b.

42 E. 3. 25.
† 1 Roll. 506.
Co. Lit. 59. a.

42 E. 3. 25. a. b. The lord brought an action of trespass against his copyholder, who pleaded not guilty; † the jury gave a special verdict, that the copyholder had not done his services, by which he broke the custom of the manor, for which reason the entry of the lord was adjudged lawful, and that he should have the corn then growing; which proves that he entered for the forfeiture, and could not put him out without cause: so 33 E. 3. Tresp. 254. If a copyholder makes an alienation, it is a disseisin to the lord, and a forfeiture of his estate.

13 R. 2.

13 R. 2. Faux Judgment 7. It is there adjudged, that where an heir of a copyholder recovered in a plaint in the nature of an assise of mortdancester, in the court of the Bishop of London, of his manor of Stepney in Middlesex, the tenant brought a writ of false judgment returnable in C. B. which writ of (b) false judgment did not lie in that case; but there it is said, that he has no other remedy but to sue to the lord, who has the freehold, by (c) petition, and he may if there be cause, reverse the judgment; by which it appears, that the heir of a copyholder is inheritable according to the custom, and shall recover by plaint in nature of an assise of mortdancester; but it is true that Charleton there says, that he shall not have an assise against his lord as tenant in ancient demesne shall have, because he has not the freehold, as Bracton says. [Yet *quære* if tenant in ancient demesne (who is only the King's villein) can be said a Freeholder?]

(b) Co. Lit. 60. a.
(c) Co. Lit. 60. b.
Lit. sect. 77.
Postea 30. b.

2 H. 4. 12. a.
(d) Fitz. Tresp.
168.
Br. Tresp. 73.
Br. Ten. per
Copy 2.

2 (d) H. 4. 12. a. A copyholder brought an action of trespass for breaking his close, and cutting his trees, and the defendant pleaded not guilty, the jury found the defendant guilty, and assessed damages, and the plaintiff recovered.

1 H. 5. 11, 12.

1 H. 5. 11, 12. A copyholder may surrender to the use of another, reserving rent with condition of re-entry for non-payment, and for default of payment, may re-enter, 4 H. 6. 11 & 21 H. 6. 37. If a Bishop grants customary lands by copy and dies, the copyhold is not determined by his death, for he was *dominus pro tempore*, and this grant shall bind the King and the grantee, (the temporalities being in the King's hands) shall have aid of the King.

7 E. 4. (a) Danby, Chief Justice said, that a copyholder is as well inheritable to have his land according to the custom, as he who has a freehold at the common law.

21 E. 4. 80. b. (b) Brian said, that his opinion always had been, and ever should be, that if such tenant by the custom paying his services be ejected by his lord, that he should have an action of trespass.

(c) 15 H. 7. 10. a. & (d) 27 H. 8. 28. a. b. A Bishop grants lands by copy and dies, the temporalities come into the King's hands, the copyhold estate stands, and he shall have aid of the King.

15 H. 8. Tenant *per copy*, Brook 24. The heir of a copyholder tenant in tail shall recover in a (e) *formedon* in the descender *per omnes justiciarios*. By which cases it appears, that the Judges in all successions of ages have allowed copyhold estates to be established and sure by the custom of the manor, and descendible to their heirs as other inheritances are.

2. It was resolved. when custom has created such inheritances, and that the land shall be descendible, then the law will direct the descent according to the maxims and rules of the common law, as (f) incidents to every estate descendible; *quia quod tacite intelligitur deesse non videtur*. As 5 E. 4. 7. b. when uses had gained the reputation of inheritances descendible, the common law directed the descent of them, and that there should be *possessio fratris* (g) of an use, as well as of other inheritances at the common law: but it was resolved, that such customary inheritances should not have by the law any other collateral qualities which do not concern the descent of the inheritance, which other inheritances at the common law had: and therefore such customary inheritance should not be † assets to charge the heir in an action of debt, on a bond made by his ancestor, although he binds himself and his heirs, neither shall the wife, of such customary tenant be (h) endowed, nor shall the husband of a woman inheritrix, of such estate be † tenant by the courtesy, nor shall a (i) descent of such estate toll the entry of him who has a customary right to it, & *sic de cæteris*; for as without custom such estate at will cannot be descendible, so without custom it cannot have any (k) collateral quality or incident to other inheritances at common law: for copyholders have estates of inheritances *secundum quid*, that is to say, to be descendible by custom to their heirs, and not to be determined by their deaths, nor subject to the lord's will, as other estates at will are, but they are not estates of inheritance *simpliciter*, *sc.* to all other collateral qualities, but such as custom has allowed, or are incident to them.

3. It

7 E. 4. 19. a.
(a) Co. Lit. 60.
b. 61. a. Lit.
sect. 77.

9 Co. 76. b.
2 Leon. 209.
21 E. 4. 80. b.
(b) 2 Leon. 209.
Lit. sect. 77.
Co. Lit. 60. b.
61 a.

15 H. 7. 10. b.
27 H. 8. 28.
(c) Fitz Aid de
Roy 98.
Br. Aid de Roy 1.
49.

15 H. 8.
(e) 1 Rol. 838.
Co. Lit. 60. a. b.
9 Co. 8. 9.
Cr. Car. 42, 43,
44, 45.
Popham 34, 35.
2d Point.
(f) Postea 23. a.

(g) 1 Co. 88. a.
121. b.
Raym. 317.
Dyer 10. b. 11. a.
pl. 40.
Br. Descent 36.
Plowd. 58. a.
Bac. Read. on.
27 H. 8. c. 10. p. 9.
Fitz. Sub. 3.
1 And. 192.
3 Co. 8. b.
2 And. 146.
Co. Lit. 14. b.
† Poph. 188.
(h) 2 Bulstr. 337.
Postea 30. b.
Co. Lit. 33. a.
2 Sid. 139.
Hob. 215.
† Cro. El. 361.
Hutt. 17.
Mo. 272, 597.
2 Bulstr. 337.
Postea 22. b.
1 And. 192.
1 Rol. Rep. 126.
(i) Postea 23. a.
Cro. Jac. 36.
(k) Hub. 215.
216.

3d Point.

(a) 1 Rol. 502;
 Dy. 291. pl. 69.
 Lane 20.
 Poph. 39.
 Cr. El. 90, 148,
 662.
 Cr. Jac. 36.
 Plow. 529. b.
 Yelv. 144, 145.
 1 Brownl. 145.
 (b) Mo. 125,
 126, 597.
 Poph. 35.
 1 Roll. 502.
 1 Bulstr. 42.
 (c) Cr. El. 504,
 662.
 Cr. Jac. 31.
 1 Vent. 260.
 3 Keb. 329.
 1 Mod. Rep. 102.
 2 Brownl. 301.
 Moor 358, 465.
 1 Roll. 505.
 4 Co. 23. a.
 Noy 29.
 † 2 Ventr. 182.
 (d) Winch. 67.
 Cr. Jac. 103.
 (e) Doct. pl. 80.
 (f) Doct. pl. 80.
 (g) Doct. pl. 80.
 (h) Doct. pl. 80.
 (i) Doct. pl. 80.
 Cr. Jac. 103.
 (k) Doct. pl. 80.

(l) Doct. pl. 80.

2.

In Lent Affizes
 24 El. in Suff. in
 River's case.
 (m) Antea 22. a.
 Cr. El. 361.
 Hutt. 17.
 2 Bulstr. 337.
 Mo. 272, 397.
 1 Roll's Rep. 126.
 1 Ander. 192.

3. It was resolved, that where the customary estate of inheritance descends to the heir, (a) before admittance he may enter and take the profits, and that there shall be a (b) *possessio fratris* before admittance on an actual possession as in the case at bar: and such heir may surrender to the lord to the use of another before admittance, as any other copyholder may, but it cannot prejudice the lord of his fine due to him by the custom of the manor upon the descent; and he is a tenant by copy of court-roll, for the copy made to his ancestor belongs to him; as the (c) admittance of a tenant for life, is the (c) admittance of him in remainder to vest the estate in him, but shall not bar the lord of his fine, which he ought to have by the custom: and although it was objected, that every † admittance of an heir upon a descent, amounted in law to a (d) grant, and so may be pleaded, and therefore nothing shall vest in the heir before admittance. To that it was answered and resolved, that true it is, that after admittance the heir may in pleading alledge (e) it as a grant, and that has been allowed to avoid the inconvenience which would otherwise ensue; for if the copyholder should in pleading (f) be compelled to shew the first grant, either it was before time of memory, and then it is not pleadable, or within time of memory, and then the custom fails, and therefore the law has allowed the copyholder in pleading to alledge any admittance, as well upon a descent (g) as upon surrender, as a grant; and yet he may, if he will, alledge the (h) admittance of his ancestor as a grant, (i) and shew the descent to him, and that he entered, and well without any admittance of him; but the heir cannot (k) plead, that his father was seised in fee at the will of the lord by copy of court-roll of such a manor according to the custom of the manor, and that he died seised, and that it descended to him, for in truth such interest is but a (l) particular interest at will in judgment of law, although it is descendible, as has been said, by custom: for he is a tenant at the will of the lord, according to the custom of the manor. *Nota*, reader, all these resolutions and opinions have been confirmed and adjudged, as appears by the cases following:

It was agreed by the two Chief Justices, Wray and Anderson, Justices of assize there, upon evidence to a jury, that where a woman copyholder in fee takes an husband who has issue, and the wife dies, that the husband shall not be tenant by the courtesy without special custom, according to the resolution aforesaid; and according to their opinions the jury passed against the husband.

It

It was adjudged, that where by the custom of the manor, plaints have been made in the court of the manor in nature of real actions, that if a recovery be in a plaint in nature of a real action against tenant in tail (admitting that copyhold land may be (a) entailed) that it should be a discontinuance, and should toll the entry of the heir in tail: for inasmuch as plaints in nature of real actions are warranted by the custom, it is an incident which the law annexes to the said custom, that such recovery shall make a (b) discontinuance, which agrees with the reason of the principal point in Brown's case.

It was adjudged that if a man seised of copyhold land in right of his wife, surrenders it to the use of another in fee, who is admitted accordingly; the husband dies, it is no (c) discontinuance to the wife or her heir, but that the wife may enter, and shall not be put to *cui in vita*, nor her heir to *sur cui in vita*. And if a copyholder for life surrenders to the use of another in fee, it is no (d) forfeiture, for it passes by surrender to the lord, and not by livery; and copyhold estates shall not have such qualities as estates at common law have without special custom, as has been often said.

In this case two points were adjudged. 1. That (e) a descent of a copyhold in fee shall not toll the entry of him who has right to the copyhold, which agrees with the resolution in Brown's and the other cases before. 2. That where the custom of the manor of Allesley in the county of Warwick, was, that copyhold lands may be granted to any person *in feodo simplici*, that a grant to one and his heirs of his (f) body is within the custom: for be it a fee-simple conditional, or an estate tail, it is within the custom. So he may grant for life or for years by the same custom, for an estate in fee-simple includes all; and it is a maxim in law, *† cui licet quod majus, non debet quod minus est non licere*. 6 Mod. 67.

Richard (g) Fitch, the father, copyholder in fee, makes a surrender to the use of himself for life, and after to the use of Rich. his son for life, and after to the use of his last will; the father is admitted and dies, and afterwards the lord pretending cause of forfeiture grants it to a stranger: in this case two points were adjudged. 1. That the admittance (h) of tenant for life, was admittance of him in the remainder, but not to prejudice the lord of his fine, which was due by the custom of the manor, according to the opinion in Brown's case. 2. It was adjudged, that the fee-simple of the copyhold being limited to the use of his will (i) remained in the copyholder, and not in the lord.

Three

163, 164, 165, 166, 167. 1 Roll. 838. Moor 188. 1 Leon 174, 175. (b) Postea 30. a. Godb. 20. Co. Lit. 52. b. Cr. El. 323, 373. 1 Roll. Rep. 48. 1 Roll. 511, 512. 1 Leon. 64. † 5 Co. 7. a. Cawdry's Case. 9 Co. 48. b. Pasch. 36 Eliz. in B. R. Rot. 231. (†) Inter Fitch and Huckleby. (†) Cr. El. 448, 442. (c) Cr. El. 148, 442. (d) Cr. El. 504, 662. Cro. Jac. 31. Nov. 29. Moor 358, 465. 1 Mod. Rep. 102. 2 Brownl. 301. 1 Roll. 505. 1 Vent. 260. 2 Kelw. 329. 2 Wilson 402.

3.
Tinn. 36 Eliz.
Rot. 547. in B. R.
(a) Deal & Rigden. Moor 358.
Cro. Eliz. 372.
1 Rol. 634. Like Judgm. in B. R.
M. 36 & 37 Eliz.
inter Clun & Pease. Rot. 1417.
(b) Moor 358.
1 Wilson 27.
1 Rol. 506, 634.
3 Co. 8, 9.
Cro. El. 391.
Cr. Car 43.
(c) Cro. El. 391, 392. 1 Rol. 694.

4.
Pasch. 35 El. in B. R. Rot. 734.
inter Bullock & Dibley in Transgreff. in Berk.
(d) Moor 596.
Poph. 38, 39.
Cro. Jac. 105.
denies this.
1 Rol. 632.
Cro. Car. 7.
3 Co. 9. a.
Like Judgm. in B. R. Eliz. inter Wright & Portman. (e) Cart. 1 238. Et 35 Eliz. in C. B. inter Foxton & Colston. Like Judgment given.

5.
M. 35 & 36 El. in B. R. inter Gravenor & Ted.
(f) Antea 22. a. Cro. Jac. 36.
(g) Cr. El. 148, 149, 307, 717.
Cro. Car. 42, 43, 44, 45. Poph. 33, 34, 35, 128, 129.
Godb. 367, 368, 369. 3 Co. 8, 9.
Co. Lit. 60 a. b. 52. b. 1 Rol. Rep. 48, 49.
2 Rolie's Rep. 383. O. Bend.

30. a. Godb. 20. † 5 Co. 7. a. Cawdry's Case. 9 Co. 48. b. Pasch. 36 Eliz. in B. R. Rot. 231. (†) Inter Fitch and Huckleby. (†) Cr. El. 448, 442. (c) Cr. El. 148, 442. (d) Cr. El. 504, 662. Cro. Jac. 31. Nov. 29. Moor 358, 465. 1 Mod. Rep. 102. 2 Brownl. 301. 1 Roll. 505. 1 Vent. 260. 2 Kelw. 329. 2 Wilson 402.

7.

Tr. 26 El.
 Clarke v. Pen-
 nifather in B. R.
 (a) 1 Rol. 502.
 Dy. 291. pl. 69.
 Lane 20. Cr. El.
 90, 148, 662.
 Cr. Jac. 36.
 Plowd. 529.
 Yelv. 144, 145.
 1 Brownl. 145.
 Poph. 39.
 Antea 22. b.
 (b) Moor 125,
 126, 597.
 1 Bulstr. 42.
 Poph. 35.
 (c) Præf. 6.
 Rep. p. 3.
 Co. Lit. 3. a.
 153. a. Plowd.
 231. a. Seld. tit.
 of Honour 86.
 9 Co. 47. a.
 Eitz. Nonabil. 9.
 Selden's Epino-
 mis 11.

(d) Co. Lit. 58. b.
 59. a.
 Cr. Jac. 98.
 1 Roll. 499.
 2 Roll. 41.

(e) 6 Co. 60. b.
 61. a.
 Dy. 71. pl. 44.

† Antea 21. a.
 Hetl. 6.
 Vide 17 Eliz.
 E. of Arundel's
 Case.
 Dyer 342.
 Cr. El. 622.

Three points were adjudged: 1. That the their of a copyholder may enter and have an action of trespass (a) before admission, and so if such heir dies before admission (as the principal case was) his heir may enter and take the profits and have an action of trespass, which agrees with the judgment in the principal point in Brown's case; and in this case Wray Chief Justice said, (that it was now lately adjudged, that there should be (b) *posseſſ' fratris* on a descent of copyhold before admittance. 2. It was adjudged, that where King H. 8. granted a manor to the Queen his wife for life, that there the (c) Queen was a sole person exempt by the common law, and may make a lease or grant without the King, and so may plead and be impleaded alone. *Vide* 10 E. 3. 18 & 50. 18 E. 3. 1, 2 & 32. 22 E. 3. Nonability 9. 32 E. 3. Brief 346. 49 E. 3. 4. 11 H. (4.) 6 67. 26 H. 6. *Aide del Roy* 24. 3 H. 7. 14. 7 H. 7. 7. and that the statute of 32 H. 8. is but a declaration of the common law. 3. It was adjudged, that where the Queen was tenant for life, and a copyhold of inheritance escheated to her, there the Queen may grant it to whom she pleases, and it shall bind the King, his heirs and successors for ever; for she was *domina pro temp'* and the custom of the manor shall bind the King. And it was resolved that every one who has a (d) lawful estate or interest in a manor, be it in fee, in tail, in dower, or tenant by the courtesy, or for life, or years, or as guardian, or tenant by statute, or *elegit*, or at will, if a copyhold escheats, or comes to their hands during their time, every one of them at their wills may re-grant it *reddend'* the ancient rent, customs, and services, and it shall bind the lord who has the inheritance or freehold of the manor, for every one of them is *dominus pro tempore*, and within the custom; as in 20 H. 6. 8. b. the Chief Justice (c) of the Common Pleas, who has his office but at will, may by custom grant offices for life: and it is to be observed, that a copyholder doth not derive his estate out of the estate or interest of the lord only, for then the copyhold estate would cease when the estate of the lord determines. But as it was said in Brown's case, † the soul and life of a copyhold is the custom of the manor; and when the grant is made by any who has a lawful estate, or interest, the copyholder is *in* by the custom without any regard to the estate, or person of the grantor, and therefore such grant made by husband and wife, shall bind the wife notwithstanding the coverture: so of a grant made by *non compos mentis*, or an infant, or by a Bishop, Prebendary, Parson, &c. it shall bind for ever; for the custom is, that the tenements are parcel of the manor. *Et dimiss' & dimissib' per dom' man', &c. pro temp' exist', seu per ejus senesch', &c.* And so a feme covert, one *non compos mentis*,

an infant, the successors of Bishops, Prebendaries, Parsons, &c. are bound by the said custom: but by force of these words in the said custom (*per dom' maner', &c. pro temp' exist'*) in some case the lord ought to have a lawful estate, and in some case not. And therefore this difference was unanimously agreed; if a disseisor, * or feoffee of a disseisor, or any other who has a torcious or defeasible estate or interest subject to the action, or entry of another, holds court, and makes any voluntary grant upon escheat, or forfeiture of a copyhold, such voluntary grant shall not bind him who has right, when he has recontinued the manor by action, or entry; for to this intent the said custom shall be intended of a lord who has a lawful estate or interest: but if such lord who has a wrongful or defeasible estate, (b) admits any upon surrender made to the use of another, or admits the heir upon a descent, such admittances are good, and within the said custom; for such acts are lawful, and *quodam modo* judicial, to do which he may be compelled and enforced in a court of equity, and therefore such admittances shall bind him who has right.

It was adjudged, that where the lord of a manor wherein were many copyholders for lives took a wife, and afterwards a copyholder died, the lord after marriage granted the land again, according to the custom of the manor for lives and died, that the wife should not (c) avoid the grants in a writ of dower; for although the grant was after the title of dower, yet the custom which is the life and force of the grant, was long before: and an opinion in 8 Eliz. was cited to the contrary, (which now *vide* Dyer 251.) and yet judgment *ut supra*. If feoffee of a manor upon condition makes voluntary grants of copyhold estates according to the custom and afterwards the condition is broke, and the feoffor re-enters, yet the grants by copy shall stand; and therewith agrees the judgment, anno 17 Eliz. the earl of Arundel's Case, Dyer 342.

It was adjudged, if tenant *pur* (d) *auter vie* be of a manor, and *cestuy que vie* dies, and he who was tenant for life continues in the manor, and holds courts, and makes voluntary (e) grants by copy, they shall not bind the lessor; (it is otherwise of (f) admittances on surrender to the use of others, or upon descent) for in such case it was resolved, that he was only tenant at sufferance, who has no lawful

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interest;

(f) Co. Lit. 58. b. 1 Roll. 503. 1 Co. 140. b. Moor 112, 237. Cr. El. 699. Poph. 71. 3 Bull. 215.

* Skinner 28.

(a) Co. Lit. 58. b.
1 Co. 140. b.
Cr. El. 699.
1 Roll. 499.
Mo. 112, 236.
237. Poph. 71.
Ow. 28. Dal. 83.
(b) 1 Roll. 503.
1 Co. 140. b.
Moor 112, 237.
Cr. El. 699.
Co. Lit. 58. b.
3 Bull. 215.
Poph. 71.

8.

P. 26 El. in B.R.
(c) 8 Co. 63. b.
Mo. 758, 812.
1 Roll. 684.
2 Brownl. 208.
Bridgm. 51.
1 Leon. 16.
Godb. 130.
2 Siderf. 82.
Dy. 251. pl. 89.
Co. Lit. 31. b.
6 Co. 19.

9.

P. 29 El. inter
Rous & Arters,
in B. R.
(d) Moor 236.
Owen 27, 28.
2 Leon. 45, 46.
(e) Co. Lit. 58. b.
1 Co. 140. b.
Cr. El. 699.
1 Roll. 499.
Mo. 112, 236.
237. Poph. 71.
Ow. 28. Dal. 83.

interest; and a writ of entry *ad terminum qui præterit* lies against him, and so he is a deforfeor of the manor.

10.

M. 33 & 34 Eliz.
in B. R. inter
Murrell & Smith
in Treipais.
(a) Cr. El. 252.
2 Leon. 209.

Upon a special verdict the case was such; Queen Eliz. seized in fee of the manor of Bawdesey Butley in Suffolk granted part of it being ancient copyhold land to Smith the father in fee; and afterwards the Queen granted the inheritance of the said copyhold to a stranger in fee; and afterwards Smith made his will in writing, and thereby devised the copyhold to Murrell the plaintiff, in fee; and at a court held at the said manor surrendered into the hands of the Queen lady of the said manor, to the use of his will; and in pleading, Smith the defendant alledged the said grant made to his father, by force whereof he was seized, &c. and being so seized, died seized, and that it descended to the defendant as his son and heir, and the plaintiff claiming by the said devise and surrender traversed the descent to the defendant: and the jurors upon this special issue, gave the said special verdict; and upon great advice and deliberation, judgment was given against the plaintiff; and in this case three points were resolved: 1. That custom has so

1st Point.

(b) 8 Co. 64. a.
Antea 21. a.
2 Co. 17. a.
Postea 26. b.
Cro. El. 103.
Cr. Jac. 573.
Hob. 181.
(c) 5 Co. 113. a.
6 Co. 57. b. 68. b.
8 Co. 63. b.
Co. Lit. 309. b.

(d) Co. Lit. 58. b.
(e) Co. Lit. 58. b.
Postea 31. b.

established and fixed the estate of a copyholder, that by the (b) severance of the inheritance of the copyhold from the manor, the copyhold is not destroyed, for inasmuch as the lord himself cannot oust the copyholder, no more can any claiming under him do it; for (c) *nemo potest plus juris ad alium transferre, quam ipse habet; & quod per me non possum, nec per alium.*

But it was objected, that every copyhold estate in any land or tenement, ought to stand upon two pillars, and without either of them cannot be supported; the one, that the land or tenement be (d) parcel of the manor; the other, that such land or tenement has been demised (e) and demisable time out of mind, so that parcel of the manor, and prescription, are two incidents to every copyhold; but in the case at bar one of them fails, for by the said severance, the land was not parcel of the manor. To which it was answered and resolved, forasmuch as the land was parcel of the manor, and custom has once on a time established and fixed the estate, so that once it had both the incidents, for this cause the severance made by the lord after the estate has had its perfection, shall not destroy the estate of the copyholder. 2. That in this case the said customary lands descended to the defendant, notwithstanding the devise and surrender, for the surrender after the severance of the inheritance of the copyhold from the manor, was utterly void, because the lands were not parcel of the manor at the time of the surrender, and the devise alone cannot transfer such customary estate; for as it appears by * Bracton before, and by Little-

2d Point.

* Antea 21. a.
Co. Lit. 59. a.
(f) Lit. sect. 74.
Co. Lit. 58. b.
59. a.

ton, fol. 15. b. it cannot be transferred but by (f) surrender into the hands of the lord, according to the custom of

of the manor. 3. That after the severance, the copyholder shall pay his rent to the feoffee, and also shall pay and do other (a) services which are due without admittance or holding of any court; as to plough the lords demesnes, heriot, and such like; but suit of (b) court, and fine upon alienation, or admittance, are gone: for now the land or tenement cannot be aliened; for as the copyholder has some benefit by this severance, as appears before, so has he great prejudice, for now he cannot (c) surrender or alien his estate, because he cannot alien it by surrender *in manus domini servitiorum*, as the custom has warranted, and that he cannot now do, nor can the feoffee make admittance or grant of the copyhold, for he is not *dominus pro tempore*: but it was resolved, that such (d) forfeitures as were forfeitures before the severance, as the making of a feoffment, lease, waste, denying of rent, or such like, are forfeitures also after the severance. So if land was of the nature of Borough English or gavelkind before; the same customs, and all other customs which run with the land, shall remain after the severance: and it was said, if such copyholder will alien, there is no means but to have a decree against him and his heirs in Chancery, but thereby the interest of the land is not bound, but the person only.

3d Point.

(a) Cr. El. 252.

(b) Cr. El. 252.
Moor 393.

(c) Cr. El. 252.

(d) Cr. El. 252,
499.
2 Leon. 203.
Moor 393.
1 Bulst. 51.Co. Coph. 101.
Rep. in Canc.
193.

Kite and Queinton's Case.

THE case was, a copyholder in fee of the manor of the Dean and Chapter of Westminster, called Launton in the county of Oxford, surrendered his copyhold lands out of court, by the hands of certain copyhold tenants according to the custom of the manor, to the use of another and his heirs upon certain conditions, and after, at the next court, the surrender was presented, but in the presentment the (b) conditions were omitted, and he to whose use the surrender was made being (c) dead, the lord by the steward, according to the custom, admitted his daughters and heirs, who entered: he who made the surrender by his deed, released to the daughter being in possession, and afterwards entered upon them, and if his entry was lawful or not was the question: and it was adjudged, that his entry was not lawful; and in this case, two points were resolved, 1. that the presentment of the said surrender was (d) void, for the surrender out of court ought by the custom of the manor, to be presented in court; but forasmuch as the surrender was upon condition, and the presentment was of an absolute surrender, the surrender which the copyholder made was not presented: but if the truth of the case was, that the surrender conditional was presented, and the (e) steward in entering thereof omitted the condition, yet upon good proof thereof, the surrender should not be avoided, but the

11.

P. 31 El. inter
Kite & Queinton
in B. R.

(a) Co. Lit. 62. a.

(b) 1 Roll. 504.

(c) Postea 29. b.
Bridgm. 51.

(d) 1 Rol. 501.

(e) 1 Rol. 501.

(a) 1 Roll. 501.
(b) 1 Roll. 501.

(c) Lit. sect. 74.
Co. Lit. 58. b.
59. a.

(d) Cr. Jac. 36,
101.
Co. Lit. 59. a.
60. a.
1 Leon. 102.
1 Roll. 504.

(e) 1 Leon. 102.

(f) Lit. sect. 74.
Co. Lit. 58. b.
59. a.
Antea 24. b.

Skin. 296.

roll should be (a) mended, for the roll should not (b) conclude in such case the party either to plead, or give in evidence the truth of the matter. The 2d question and the greater doubt was, if by the said release by deed, the customary right of the copyholder was extinct, and he who made the surrender barred of his right. And it was objected that Littleton, fol. 15. b. saith, that a copyholder cannot alien his land by (c) deed; but if he will alien, he ought according to the custom, &c. surrender, &c. And he saith, that such tenants are called tenants by copy, because they have no other evidence concerning their tenements, but the copies of the court-rolls. And it was said, that that excludes all releases by deed, for then they would have other evidences than the court-rolls. Also it was said, that he who purchases the land, may, upon searching the rolls, be advised if the title of the land be good. But if a release by deed should extinguish rights, then it would be very dangerous to purchasers, for that doth not appear in the rolls. To which it was answered and resolved, that the (d) release in the case at bar extinguished the right of the copyholder; and their reason was, because he to whom the release was made was admitted to the tenements and copyholder in possession; so that a release of the customary right may enure to him, and therefore the lord is not at any prejudice, for he has had his fine upon admittance, and he to whom the release was made was *in* by title, *scil.* by the lord's admittance, and so the release enures by way of extinguishment: but if a copyholder be (e) ousted by one by tort, there his release by deed to the disseisor, or other wrong doer, doth not transfer his right, nor bar him for two reasons: 1. Because he has no customary estate upon which the release of the customary right can enure. 2. It would be to the lord's prejudice, for thereby he would lose his fine and services; and for these reasons, the release by deed in such case is utterly void, and this is not against any thing Littleton saith, for Littleton speaks of an alienation by (f) surrender, and that of necessity ought to be into the lord's hands, according to the custom: but the release in the case at bar could not be made to the lord, but to the copyhold tenant in possession: also he who claims a copyhold estate by surrender, hath no other evidence but copies, and so are Littleton's words to be intended. But he who claims extinguishment of a right, may have it by release by deed: so the resolution in Murrel's Case before well agrees with the judgment in this case upon the difference aforesaid. in transferring of an estate, and extinguishing of a right: and as to the danger of purchasers, it was said, that there was not any danger; for if the copyholder who is in possession sells it, he will shew the purchaser the release made to him, and he who is out of pos-

possession, ought not to sell it until he has regained the possession; and if any one will purchase any title, he is not to be favoured, but in such case * *caveat emptor*: And yet he who has made such release, may and ought to acquaint the purchaser with that which he himself has done, and so no mischief. And Wray Chief Justice in this case said, that if one who has a pretended right or title (a) to copyhold land, bargains and sells it to another, it is within the statute of 32 H. 8. cap. 9. for the statute saith, "if any bargain, buy, or sell, &c. any right or title, in or to any lands or tenements:" so that these words, "any right or title," extend to all manner of rights or titles, & *per consequens* to copyhold lands. And great part of the land of the kingdom is in grant by copy; and therefore the intent of the makers of the act was to include it, for avoiding of suits, maintenance, and champerty, and not to leave all copyhold estates to the mischiefs mentioned in the preamble of the said act, and especially when a (b) lease for years has been adjudged in Partrich's and Croker's Case. Plow. (c) Com. 77, &c. to be within the said act.

WILLIAM (a) MELWICH brought an *eject' firmæ* against John Luter and Mary his wife, on a demise made by John Melwich of land in Eastworth in the county of Salop, for one year, &c. The defendant pleaded, not-guilty; and the jury gave a special verdict to this effect: the Abbot of Tewksbury was seised of the manor of Boveridge, whereof the said tenements in which, &c. were parcel, and copyhold land of the same manor; and that there were many other ancient copyholds of the same manor in Eastworth aforesaid, which manor came to the King by dissolution. And the King anno 37 H. 8. granted the inheritance of all the copyholds in Eastworth, to John Ogden and his heirs, who called it his manor of Eastworth: and afterwards a copyholder of the tenements aforesaid, in which, &c. surrendered them to the said John Ogden, who also being seised of the manor of Harbridge within the same county, at Harbridge, granted the tenements in which, to John Melwich the lessor of the plaintiff by copy, according to the custom of the manor of Eastworth, for term of his life, and that the plaintiff was possessed until he was ejected by the defendants, claiming it under the title of John Ogden, pretending that the said grant by copy did not bind him. And afterwards upon good advice, judgment was given for the plaintiff; and in this case four points were resolved.

1. That lessee of a copyhold (b) for one year shall maintain (c) *1st Point.*
eject' fir'; for inasm. as his term is warranted by the law by the
general custom of the realm, it is reason that if he be ejected,

R 3

that

(c) Cr. El. 102, 103, 224, 225, 304, 395. Cro. Jac. 403. 1 Leon. 323. Poph. 188. Owen 18. Lit. Rep. 223. Heil. 126. 9 Co. 75. b.

* 5 Co. 84. a.
1 Rol. Rep. 195.
2 Buist. 337.

(a) Co. Lit. 369.
b.
Cr. Car. 43.

(b) Dy. 74. pl. 19.
20 Plowd. 77. b.
78. &c.
Moor 266.
1 Leon. 166.
Sav. 95, 96.
1 And. 75, 76,
&c. 201, 202.
Goldsb. 101, 102.
Dy. 374. pl. 16,
17.
(c) Plowd. 77,
78, &c.

12.
30 El. inter Mel-
wich & Luter in
B. R.
(a) Cr. El. 102,
103.

Moor 679.
3 Bulstr. 214.
Bridgm. 49, 50.
(b) 1 R. II. 246.
Hutt. 101.

that he should have *ejectione firmæ*, and it is a speedy course for a copyholder to have the possession of the land against a stranger.

2d Point.

(a) Cr. El. 103.
Cr. Jac. 573.
Antea 24. b.
2 Co. 17. a.
8 Co. 64. a.
Hob. 181.

3d Point.

(b) Cr. El. 103,
394, 395, 443,
662. Postea in
Neale's Case.

(c) Co. Lit. 58. a

(d) Co. Lit. 58. a.

4 Co. 33. b.

6 Co. 11. b.

8 Co. 60. b.

9 Co. 48. b. 49. a.

Godb. 49. 1 Roll.

543 Cr. El. 792.

Cr. Jac. 582.

4 Inst. 266, 268.

7 E. 4. 23. a.

21 E. 4. 66. b.

1 Mod. Rep. 171.

12 H. 7. 16, 17.

Br. Judges 18. B.

Court Baron. 9.

B. N. C. 116.

(e) Co. Lit. 58. a.

(f) Palm. 444.

Poph. 166.

(g) Cr. El. 39,

103, 443.

4th Point.

(b) 1 Roll. 499,

500, 505.

Co. Lit. 59. a.

61. b.

(i) Postea 27. a.

Owen. 35.

Co. Lit. 58. a.

Cr. El. 103.

1 Roll. 505.

B. N. C. 387.

Br. Court Baron

22. Br. Tenant

per Copy 26.

13.

Cr. El. 44, 405.

2. That by the (a) severance of the inheritance of copyholds from the manor, the copyholds were not destroyed, but remained of force and effect, which agrees with the said judgment in Murrel's Case.

3. When the lord of a manor having many ancient copyholds in one town, grants the inheritance of all the copyholds to another; the (b) grantee may hold court for the copyhold tenements, and take surrenders to the use of others, and make admittances and grants: for although it is not a manor in law, because it wants free tenants, yet as to the copyhold tenants, the feoffee or grantee has such a manor, that he may hold a court to make admittances and grants of the copyhold tenements: for every manor which consists of freehold and copyhold tenements, comprehends in itself in effect two (c) several courts; one which is commonly called the Court Baron, *f.* the Court of Freeholders, and in this court the (d) suitors, *f.* the free tenants are judges, and therewith agree 7 H. 6. 39 H. 6. 5. 6 E. 4. 3. 12 H. 7. 16. Another court is for the copyholders, and as to that, the lord or the (e) steward of the manor is judge; and as the other is called the Freeholder's Court, so this may be called the Copyholder's Court: and therefore when the lord grants over the inheritance of his copyholds to another, the grantee may hold such court for the copyhold tenements only, as his grantor might. And as to this court it need not have any free tenants; so if the freeholds escheat, or if the lord releases the tenure and services of all his free tenants, yet the lord may hold a customary court for his copyhold tenements, and make admittances and grants of them; (f) *beneficiaria est expositio, quando res redimitur a destructione.* Nota reader, although the lord by his own act cannot (g) make of one and the same manor at the common law sundry manors consisting upon demesnes and freeholders, yet he may by his own act, as by this judgment appears, make a customary manor consisting upon copyholders only, as to the purposes aforesaid.

4. It was resolved, that the lord (b) himself may make a grant or admittance of a copyhold out of the manor at what place he pleases; but the (i) steward of the court of a manor, cannot at any court held out of the manor make grants or admittances.

Neale and Jackson's Case.

IT was adjudged by Anderson Chief Justice of the Common Pleas, Walmsley, & *totam curiam*, that where the lord of a manor demises all his lands granted by another for two thousand years, that such lessee may

(a) may hold a court for the copyholds, according to the resolution of the third point in Melwich's Case. And in this case it was said, that so it was resolved by all the Justices, in the case of Sir Chr. (b) Hatton, late Lord Chancellor of England touching copyholds in Wellingborough in Northamptonshire: *nota* reader, a good difference between these cases which consist upon numbers of copyholds which may support a custom, and one single case of a copyhold, as in Murrel's Case before, in which the lord doth not grant *tacitè* any customary court, nor the grantee having but one single copyhold, cannot hold court.

Clifton and Molineux.

TWO points were resolved by Wray Chief Justice, Sir Thomas Gawdy, & *tot' cur'*, upon evidence given to a jury; that if a court be held by a steward of a manor (c) out of it, and divers grants and admittances there made; the court and all the grants and admittances are void, for the court of the manor ought to be held within the manor, and not out of the jurisdiction of it; which agrees with the resolution of the fourth point before, in Melwiche's case. But it was resolved, that by (d) custom the court may be held out of the manor, and grants and admittances made there good enough, as divers Abbots, Priors, &c. used to hold courts at one manor, for divers several manors, and good by custom. 2. It was resolved, that where a woman tenant for life takes husband, and the husband commits waste against the custom of the manor, and dies, the estate of the wife is utterly forfeited (e) by the act of the husband. But if (f) a stranger commits the waste without the assent of the husband, it is no forfeiture; and according to this resolution it was certified into the Chancery by Mead and Periam, two of the Justices of the Common Pleas between the same parties as to both points, upon conference had with divers other Justices.

Taverner and Cromwell.

IT was resolved by Wray Chief Justice, Sir Tho. Gawdy, & *tot' curiam*, upon evidence to a jury, that if a copyholder be seised by force of several copies, *scil.* of Black Acre by the rent of 3d. and of White Acre by the rent of 4d. and of Green Acre, by the rent of 6d. and afterwards the copyholder commits (b) waste in part of Black Acre, or makes a feoffment of part of Black Acre, or denies the rent of that acre, by that all Black Acre is forfeited, (i) but it is no forfeiture of White Acre, nor of Green Acre. For altho' they all are in one and the same hand, yet every acre is held severally, and to every acre there is a several condition in law (k) *tacitè* annexed, so as the forfeiture of the one cannot be the forfeiture of any of the others, for the several conditions in law follow the several tenures; and therefore the forfeiture of the one cannot be the forfeiture of any of the others: so it was at the same time resolved,

R 4

that

Jackson in C. B.
(a) Antea 26. b.
Cr. El. 103, 394,
395, 243, 662.
(b) Cr. El. 103,
395, 443, 662.

14.

Mich. 27 & 28 El.
inter Clifton &
Molineux in B.R.
(c) Antea 26. b.
Ow. 35. 9 Co.
51. b.
Cr. El. 103.
1 Roll. 505.
B. N. C. 387.
Br. Court Baron
22. Br. Tenant
per Copy 26.
Co. Lit. 58. a.
(d) Co. Lit. 58 a.
Cr. Car. 367.

(e) 1 Roll. 509.
2 Roll. Rep. 344,
361, 372.
Cr. El. 149.
Cr. Car. 7.
O Bend. 83, 119.
God. 345.
Palm. 383, 384.
(f) 1 Roll. 508.
F. N. B. 60. G.

15.

Tr. 26 El. in B.R.
inter Taverner
& Cromwell.
(g) Cr. El. 353.
Co. Ent. 272, ad
288.
(b) 1 Bulst. 51.

(i) Cr. El. 353.

(k) Postea 28.

(a) 3 Leon. 109.
Postea 28. a.

that if the said copyholder of the said three acres severally held as aforesaid, surrenders them to the use of A. and his heirs, and the lord admits A. accordingly, (a) *tenendum per antiqua servitia inde prius debita & jure consueti*, or to such effect; and after A. commits a forfeiture in Black Acre, he shall forfeit *that* only, and none of the others, for the said *tenendum* (*reddendo singula singulis*) continues the several tenures; and so it is not material whether the copyholds be in one or several copies, but whether the tenure be one or several; is only material as to this purpose; and so was it adjudged upon demurrer, Hil. 35 Eliz. in C. B. inter James Taverner plaintiff, & Thomas Cromwel defendant. So if divers several copyholds escheat to the lord, and he regrants them to another, *tenend' per antiqua servitia, &c.* they shall be severally held as they were before the escheat: and in this case it was resolved, that when a copyholder surrenders to the use of another, and the lord admits him, now he who is so admitted is (b) *in* by him who made the surrender; and in a plaint in nature of a writ of "entry in the per," shall be supposed "in the per" by him who made the surrender; for the lord is but an (c) instrument to make admittance, and he who is admitted shall not be subject to the charges or incumbrances of the lord: and so reader, where it is said in the case of Clifton and Molineux before, that by the forfeiture of the husband all the estate of the wife shall be forfeited, it is to be intended all the copyhold estate under the same tenure.

(b) Postea 28. b.
29. b. Mo. 358.
Cr. El. 361.
Co. Lit. 59. b.
Bridgm. 51.
1 Roll. 503.
Cr. Car. 205.
(c) Cr. El. 361.
Postea 29. b.
Bridgm. 51.
1 Roll. 503.
2 Co. 63. b.
13 Co. 3.
Moor 112.
See Skin. 192,
306.

Hobart and Hammond.

16.
Mich. 42 & 43 El.
in B. R. inter
Hobart &
Hammond.

UPON evidence to a jury, these points were resolved by Popham Chief Justice, Gawdy, Clench, and Fenner, Justices of the King's Bench.

(d) Mo. 622, 623.
Cr. El. 351, 779.
Cr. Car. 196.
1 Roll. 507, 523.
2 Roll. 578.
1 Roll. Rep. 33.
11 Co. 44. a.
13 Co. 3.
1 Brownl. 186.
Treby's Argument in quo Warranto 34.
Hob. 135 Co. Lit.
56. b. 59. b. 60. a.
Antea 21. b.
Vide supra 21. b.
Brown's Case.
Cumb. 44.
(e) Cr. El. 351,
779.

1. That if the fines of copyholders of a manor upon admittance, be incertain, yet the lord cannot demand or exact excessive and (d) unreasonable fines, and if he does, the copyholder by the law may deny to pay them without any forfeiture; and it shall be determined by the opinion of the Justices, before whom the matter is depending, either upon demurrer, or upon evidence to a jury upon the confession or proof of the yearly value of the land, whether the fine demanded was reasonable or not: for if the lords might assess excessive fines at their pleasures, all the estates of copyholders, which are a great part of the realm, and which have continued from time whereof, &c. would be at the wills of the lords defeated and destroyed, which would be inconvenient. And it was said, that according to this resolution in this point, it had been adjudged in C. B. in (e) Hoddesdon's Case.

2. It was resolved, if the lord in case of incertainty of fines, assess a reasonable fine, and requires the copyholder to pay it, the

the copyholder is not bound (a) to pay it presently, because he cannot tell what fine the lord will assess, *et * nemo tenetur divinare*; and therefore he cannot provide any certain sum, and therefore he shall have convenient time to pay it, if the lord himself appoints no certain day for payment of it; but otherwise it is of fines certain.

3. It was resolved, that where a copyholder has several lands severally held by several services by copy, there the lord ought to assess and demand the fines (b) severally for every parcel which is so severally held. For the tenant may refuse (c) to pay the fine for one parcel, and forfeit that, and pay the fines for the others; and as it was agreed in Taverner's case, every several tenure has a several condition in law (d) *tacite* annexed to it; and therefore the lord ought for every several tenure to assess and demand a several fine: so if all the said several copyholds are surrendered to the use of another and his heirs, and the lord admits him (e) *tenendum per antiqua servitia inde prius debita & de jure consueta*, there, as it was also resolved in Taverner's case, the tenures are several, and therefore the fines ought to be severally assessed and demanded.

4. Popham Chief Justice said, it was adjudged in Sandes case, that no fine is due to the lord either upon surrender or descent until admittance; for the admittance is the cause of the fine, and if after the tenant denies to pay the fine, it is a forfeiture. And so it was resolved by Wray and Periam Justices of assize in evidence to a jury in the county of Suffolk inter Nicholas Bacon, Knt. plaintiff, & Flatman, defendant, for a copyhold of the manor of Walfham in the Willows, in the county of Suffolk.

Westwick and Wyer.

THE case was such; Alice Westwick was copyholder of the tenements in which, &c. in fee, held of the manor of Peter Leyston in the county of Bucks; and 12 H. 8. surrendered the tenements into the hands of the lord of the said manor to the use of W. Westwick her son in fee; and at the next court held 13 H. 8. for the same manor, the entry in the roll was to this effect; *ad hanc curiam venerunt Will. Westwick & Johan' uxor' ejus, & ceperunt de domino tenementa præd' cum pertinentiis in quibus, &c. præf. W. Westwick & Joh' uxori ejus: tenend' eisdem W. & J. & hæred' suis, &c.* And afterwards William died, and Johan. survived and surrendered the tenements to the use of the defendants, who entered, upon whom the plaintiff as cousin and heir of Will. Westwick entered, and the defend. re-entered; and the plaintiff brought an action of trespass, and all this was found in a special verdict: and it was argued by the plaintiff's counsel, that the plaintiff ought to have judgment

(a) Cr. El. 779.
Moor 623.
13 Co. 2. Palm.
550.
* Lit. Rep. 98.
4 Co. 66. b.

(b) Cr. El. 779.
Moor 623.
(c) Cr. El. 779.
Moor 623.

(d) Antea 27. a.

(e) Antea 27. b.
3 Leon. 109.

Inter Bacon &
Flatman.

17.
Tr. 33 El. 2. in
B. R. Westwick
v. Wyer & Ux'.

Antea 23. a.
contra.

(a) Cr. Jac. 368.

(b) 8 Co. 135. b.
9 Co. 107. a.
Co. Lit. 59. b.

(c) Antea 27. b.
Moor 358.
Cr. Eliz. 361.
Co. Lit. 59. b.
Bridgm. 51.
1 Rolles 503.
Postea 29. b.
Cr. Car. 205.
(d) 1 Roll. Rep.
195.

(e) Postea 29. a. b.

(f) 10 Co. 140.
2.
6 Co. 67. a.
7 Co. 5. a.
(g) Lane 99.

ment for divers reasons. 1. When Alice Westwick surrendered her land to the lord of the manor to the use of W. W. by the surrender the estate of the copyholder is in the lord, which he might grant to any stranger, as the feoffees to an use might at the common law; and W. W. had no remedy but in a court of (a) equity, to compel the lord to admit him, & *per consequens* when the lord grants the land to W. Westwick and his wife in fee, it is a good grant to both. 2. Will. Westwick in the case at bar, having but remedy in equity to be admitted to the land, it shall be intended that Will. Westwick requested the lord to make a grant to him and his wife, for so much is implied in it, when it is said, *quod ad hanc curiam venerunt W. Westwick & Johan' uxor ejus, & ceperunt, &c.* and every admittance of a copyhold amounts in law to a grant, wherefore they conceived that judgment ought to be given for the plaintiff. To which it was answered and resolved by the court, that as to the first reason the plaintiff's counsel had mistaken the law. For when A. W. surrendered the land to the lord to the use of W. W. the lord by the custom (which makes the law in such case) had but a customary power to make admittance (b) *secundum formam & effectum sursum redditionis*, and therefore it is not to be likened to the case of feoffees at the common law. And although the lord grants the land over by copy to another, all *that* is without warrant, for notwithstanding *that*, the lord may make admittance according to the surrender, and that shall be good, and he who is admitted shall be (c) *in* by him who made the surrender, as it was resolved in Taverner's case before: and therefore it was agreed *per totam curiam*, if the lord after such surrender grants the land to *cestuy que use* and a stranger, the whole shall enure to the *cestuy que use*; or if he admits *cestuy que use* upon condition, the (d) condition is void, for, after admittance, he is *in* by him who made the surrender. As if a man devises a term to J. S. and the executors agree and assent that J. S. and J. N. shall have the term, or that J. S. shall have it upon condition, in these cases J. S. shall have the term solely and absolutely, for after the assent of the executors he is *in* by the devise. And it was said, that it has been lately adjudged in Bunting's case, that where a copyholder surrenders to the lord to the use of another for life, (e) and the lord admits him to hold to him and his heirs, that yet he who is so admitted, has but an estate for life, for he is *in* after the admittance by force of the surrender. As to the second objection it was answered and resolved, that, without special custom, (for (f) *consuetudo loci est semper observanda*,) or other special matter which is in this case, the admittance shall enure (g) only to the husband for the reasons aforesaid; wherefore judgment was given against the plaintiff.

Bunting

Bunting *versus* Lepingwel.

THE case as it was found by special verdict was to this effect; J. Bunting the plaintiff's father, and Agnes Addingthall contracted matrimony between them *per verba de presenti tempore*; and afterwards, 1 Decemb. anno Dom. 1555, the said Agnes took to husband Thomas Twede, and afterwards 9 Julii, 1556, John Bunting libelled against the said Agnes upon the said contract in the Court of Audience, upon the proceeding in which libel, *decretum fuit quod præd' Agnes subiret matrimonium cum præfato Johanne Bunting, & insuper pronunciatum, decretum & declaratum fuit dictum matrimonium fore nullum, &c.* And further it was adjudged, that the said John and Agnes should intermarry, which they did, and had issue the plaintiff, the said T. Twede then living, and afterwards John Bunting died; and it was further found, that one Richard Bunting, father of the said John was a copyholder in fee of the land in which, &c. held of the manor of Goldingtons in Caniscoln in Essex, and out of court, according to the custom of the manor, surrendered by the hands of customary tenants to the lord of the manor to the use of Margaret his wife, and Robert his younger son, and died, after whose death the said surrender was presented according to the custom, and thereupon the lord of the manor gave admittance, and granted seisin of the land to Margaret and Robert, and to the heirs of Robert; and Margaret died, and Robert survived, and surrendered the land to the use of Emme his wife, and died; Emme was admitted, Charles Bunting as cousin and heir of the said Rich. Bunting, *sc.* son and heir of John, son and heir of the said Rich. entered upon Emme, and the def. as her servant, and by her command re-entered, upon which re-entry the plaintiff brought the action: and in this case five points were adjudged. 1. That although Twede then being *de facto* the husband of the said Agnes was not party to the said suit, nor to the sentence in the Spiritual Court which dissolved the marriage betwixt him and the said Agnes, but the said Agnes (a) only; yet the sentence against the wife only, being but declaratory, was good, and should bind the husband *de facto*, and forasmuch as the consueance of the right of (b) marriage belongs to the Ecclesiastical Court, and the same court has given sentence in this case, the Judges of our law ought (although it be against the reason of our law) to give faith and (c) credit to their proceedings and sentences, and to think that their proceedings are consonant to the law of holy church, for (d) *cuiuslibet in sua arte perito est credendum*, and so have the Judges of our law always done, as appears in (e) 34 H. 6. 14. b. 11 H. 7. 9. a. b. 8 Aff. pl. So that it was resolved, that the plaintiff was (f) legitimate, and no bastard.

2. When R. Bunting copyholder surrendered into the hands of the lord to the use of the said Margaret and Rob. without

limi-

18.

M. 27 & 28 El.
inter Bunting
v. Lepingwel.
Moor 169, 170.
171. 2 Inst. 684.
Skin. 468, 470.
493.

(a) Moor 169.

(b) Carth. 233.

(c) 2 Ventr. 43.

5 Co. 7. a.

Cawdrie's Case.

Cawly 31.

7 Co. 42. b.

(d) 5 Co. 7. 2.

Cawdrie's Case.

Cawly 31.

7 Co. 19. 2.

Calvin's Case.

Co. Lit. 125. a.

(e) 7 Co. 43. b.

(f) Moor 169,

171.

- (a) Co. Lit. 59. b. limitation of any (a) estate, it was resolved, that they had but an estate for lives, for as well estates as descents shall be directed by the rules of the law, as necessary consequents upon the custom, unless there is a special custom (which is always to be observed) within the manor; as these words, *sibi & suis*, or *sibi & assignatis*, or such like may by custom create an estate of inheritance. And it was observed that the estates in the cases limited upon surrenders, are always annexed to the estates of him to whose use the surrender is made, and always the surrender to the lord is general (b) without limitation of any estate.

3. It was resolved, that when the lord made admittance and delivered seisin to Margaret and Robert, and to the heirs of Robert, it was only an (c) admittance to them for the term of their lives, the reversion over to Richard Bunting who made the surrender, because the lord is but an instrument (d) in this case, and when he has admitted according to the effect of the surrender, nothing remains in him but the reversion of the estate in him who made the surrender to dispose of as he pleases according to the custom of the manor; and those who were admitted for their lives were *in* (e) by him who made the surrender, which cannot be if the reversion shall be in the lord.

4. Although he who is admitted is *in* by him who made the surrender, yet it was resolved that a man may surrender (as Robert Bunting did in this case) to the use of his wife, because the husband doth not make it immediately to the wife but by two means, *sc.* by surrender of the husband to the lord to the use of the wife, and by admittance of the lord to the wife according to the surrender.

5. When Rich. Bunting made the surrender out of court (f) and died before it was presented in court, yet the surrender being presented after his death according to the custom is good, but if it had not been presented according to the custom, then the surrender became of no force or effect. So if the (g) tenants by whose hands the surrender was made die, yet if it is upon good proof, presented, it is good enough. So in the case of (h) Kite and Queinton before, where he, to whose use the surrender was made, died before admittance, yet his heirs shall be admitted. And this last point was resolved without any difficulty or scruple, and *that* was the true case of Bunting mentioned in (i) Westwick's Case next before, and well agrees with the reason of the same case.

THE (k) case was, within the manor of Chaldwarton in the county of Southampton, there were divers customary lands and tenements, and which by custom of the manor, from time whereof, &c. had been granted by copy of court-roll of the same manor, for one, two, or three lives; of

(c) Antea 28. b.

Co. Lit. 59. b.

8 Co. 135. b.

9 Co. 107. 2.

Cr. El. 392.

Cr. Car. 205.

1 Rolles 504.

(d) Cr. El. 361.

Cr. Car. 205.

Antea 27. b.

Bridgman 51.

1 Roll. 503.

8 Co. 63. b.

Moor 112.

13 Co. 3.

2 Siderf. 61.

(e) Antea 27. b.

28. b. Moor 358.

Cr. Eliz. 361.

Co. Lit. 59. b.

Bridgman 51.

1 Rolles 503.

Cr. Car. 205.

See 2 Wilton

254, 255.

(f) Cr. Jac. 403.

1 Rolles 100, 501.

Co. Lit. 59. b.

3 Bulstr. 215.

1 Roll. Rep. 415.

Bridgman 51.

Lane 99. 2 Syd.

37, 38, 61, 62.

1 Rolles 504.

2 Sand. 422.

1 Mod. Rep. 102.

(g) 3 Bulstr. 215.

Bridgman 51.

(h) 1 Rolle 504.

Antea 25. a.

(i) Antea 28. b.

19.

P. 36. El. Down

v. Hopkins in

B. B.

(k) Cr. Eliz.

323.

of which manor Sir George Pawlet and Elizabeth his wife, as in right of his wife were seised, &c. and at a court of the said manor, 4 & 5 Phil. & Mar. granted the place where, &c. being parcel of the customary tenements, &c. to the said Down, *durante viduitate sua*; and if this grant was according to the custom of the manor or not, was the question: and it was adjudged that this grant was within the custom, for every grant (a) *durante viduitate* is an estate for life, as appears by Lit. 90. & 37 H. 6. 27. 14 H. 8. 13. a. &c. but every grant for life is not *durante viduitate*, for a general estate for life is larger and more beneficial than *durante viduitate*. In Mich. 2 & 3 Eliz. Dyer 192. issue was taken, whether the custom of a manor was, that the wife of every copyholder should have the land after the death of her husband for the term of her life; and it was given in evidence that the custom was, that she should have (b) it *durante viduitate sua*, and it was adjudged, that this evidence did not maintain the custom alledged before, because it is a less estate than custom *pro termino vite* was, and the effect and substance of issues joined betwixt the parties are to be proved precisely: but in the principal case it was resolved, that the custom is well pursued, because the estate granted was less (c) than the custom warranted; and *that* agrees with the resolution before of the second point in Gravenor's Case. And in this case it was said, that the lord of a manor may by (d) word retain one to be steward of his manor, and to hold the courts thereof, as well as a (e) bailiff may be, and that by word, and this retainer shall serve till he is discharged, and therewith agrees 8 Eliz. Dyer 248.

IN this case three points were resolved. 1. That the lord of a manor may retain one to be steward of his manor, and to keep his courts by (g) word, and this retainer shall endure till he is discharged thereof, and this agrees with the opinion in the case next before.

2. That where a copyholder of the Queen's manor was attained of felony, by which his copyhold escheated, the Queen's Steward of the same manor might (b) grant it over *ex officio* without any special warrant; for the custom of the manor warrants the steward of the manor for the time being to grant it, and the custom binds the Q. her heirs and successors: but although he may, by the law, do it, yet his duty is, before he makes any grant, to inform the Lord Treasurer of England, Chancellor and Barons of the Exchequer or some of them, for his better direction, and for the Queen's greater profit in those cases.

3. It was resolved, that the K's Auditor (i) or Receiver has not

(a) Lit. sect. 380. Co. Lit. 42. a. 234. b. 37 H. 6. 26. Fitz. Brief 136. Br. Waste 102. Br. General brief 11. 4 Co. 3. a. Dyer 305. pl. 59. Moor 31. (b) Dyer 192. pl. 23. Cr. El. 415. Doct. pl. 200, 205. (c) 4 Co. 23. a. 1 Rolles 511. Co. Lit. 52. b. Cr. Eliz. 323. 373. Godb. 20. 4 Leon. 64. 1 Rolles Rep. 48. 1 Leon. 56. Salk. 189. (d) Co. Lit. 61. b. Kelw. 158. b. Cr. Jac. 526, 527. 1 Leon. 227, 228. Godb. 142. Dyer 248. pl. 79. Infra. 30. a. (e) Kelw. 174. pl. 2. 7 H. 7. 10. a.

20. Tr. 41 Eliz. Harris and Jay (f) in B. R. on a special Verdict. Cr. El. 699. a. (g) Dyer 248. pl. 79. Kelw. 158. b. Co. Lit. 61. b. Cr. Jac. 526, 527. Godb. 142. 1 Leon. 227, 228. (b) Cr. El. 699.

(i) Cr. El. 699.

not

not power to retain a steward to hold the Queen's Courts: but he ought (if such voluntary grants by him made upon escheats or forfeitures shall be good) to have letters patent of the office of the stewardship of the same manor.

21.

Lady Holcroft's
Case.

(a) Antea 30.
Co. Lit. 61. b.
Kelw. 158. b.
Cr. Jac. 526,
527. 1 Leon. 227,
228. Godb. 142.
Dyer 248. pl. 79.
(b) 1 Leon. 227.
Godb. 142. Cro.
Jac. 526, 527.
1 Ro. 500. Co.
Lit. 59. a.

(c) Co. Lit. 61. b.

22.

Trin. 37 Eliz.
Shaw & Thomp-
son.

(d) Moor 410,
411. Cr. Eliz.
426. 1 Rolles
600, 601.

(e) 2 Siderf.
139. 2 Bullf. 337.
Hob. 215.
Antea 22. a. Co.
Lit. 33. a.

(f) 1 Rolle 600.
Co. Lit. 32. b.
Cr. Car. 43.
2 Inst. 80. Moor
411.

(g) Cr. El. 426.
Noy. 129.

(h) Antea 22. a.

(i) Antea 22. b.

(k) Moor 410,
411. 1 Rolle
600, 601.

(l) 1 Rolle 600,
601. 13 Rich.

2. Faux Judg-
ment 7. Antea
21. b. Lit. sect.

77. Co. Lit. 60. b.

Vide 13 R. 2.
cited before in

Brown's Case,
& 14 H. Vice

7 E. 4. 29.

23.

P. 37 El. Hoe &
Taylor in Error
in B. R.

(m) Cr. El. 413.

Moor 355.

God. 174.

13 Co. 69.

Lady Holcroft's Case.

AND it was said in this case, that it was adjudged in C. B. in the lady Julian Holcroft's case, that where one was generally retained by the lord of a manor by (a) word to be steward of his manor, and to keep his courts, that such steward might take (b) surrenders of customary tenements out of the Court; for till such steward is (c) discharged, he is steward of the manor, as well by the retainer by word, as if he had a grant thereof by deed.

Shaw and Thompson.

THE case was, that the plaintiff late the wife of a copyholder in fee of a manor in which by special custom women were to be endowed, recovered dower by plaint in the court of the manor, and because her husband died seised, she recovered 50l. damages for the profits from the death of her husband: the woman brought an action of debt for this 50l. in B. R. And in this case, 1. It was resolved, that the wife should not have dower (e) of a copyhold, unless it be by special custom. 2. When a wife is to be endowed by custom of a copyhold, then she shall have all incidents to dower, and therefore in such case she shall recover damages by the statute of (f) Merton, cap. 1. *de viduis*, &c. and therefore in the case at bar the recovery of damages was lawful; and although they exceed (g) 40s. yet they were well warranted by law; which two points well agree with the resolution before in (i) Brown and Rivet's Case. 3. It was resolved, that no action of debt lies for the said damages at common law, for upon such judgment no writ of error (k) or false judgment lies, but the (l) remedy is in the Court of the Manor, or in the Chancery, which is also consonant to the resolution in Brown's Case. And Fenner Justice said, that he had seen a record of 36 H. 8. where the lord upon a petition to him, had, for certain errors in the proceedings, reversed such judgment given in his own court; and upon that, the defendant shall have *audita querela* to be restored to the damages recovered against him.

Hoe and Taylor.

THE said writ of error was brought upon a judgment given in C. B. where the case was such; Henry Jer-ningham, Esq. was lord of the manor of Mutford, in the county of Suffolk, and Taylor claimed the underwood of a great wood called Mutford Wood, parcel of the same manor, to be demised, and demiseable from time whereof, &c. by copy of court-roll of the same manor, &c. to be cut yearly
by

by four (a) or five acres at the moft, and conveyed to himfelf a grant of the faid underwood by copy, &c. according to the cuftom; and for trefpafs done in the underwood, he brought the action of trefpafs againft Hoc. And it was adjudged in C. B. that underwood growing upon parcel of the manor might by cuftom be granted by copy of court-roll of the fame manor; and *that* judgment was affirmed in B. R. for it was there faid, that the faid (b) underwood might be granted by copy, becaufe it grew upon parcel of the manor; alfo it is a thing of perpetuity to which cuftom may extend, for after every felling, the underwood grows again, *ex flupitibus*. So it was refolved, that (c) herbage, or any (d) profit of any parcel of the manor, might by cuftom be granted by copy: and it was faid that a (e) fair appendant to the manor of Crokenhorn in the county of Somerfet, is granted by copy of the fame manor. And *that* well explaineth the refolution in Murrel's cafe before, concerning the firft of the pillars upon which every copyhold ftands, *fc.* cuftom. The 10th cafe of thefe.

(a) Cr. El. 413.
Moor 355.

(b) Jenk. Cent.
274. Cr. El. 413.
Moor 355. Co.
Lit. 58. b.

(c) Co. Lit. 58. b.
1 Rolle 498.

Jenk. Cent. 274.
(d) Jenk. Cent.
274.

(e) Antea 24. b.
Jenk. Cent. 274.
Cr. El. 413.
Moor 355.
Co. Lit. 58. b.

French's Cafe.

IT was adjudged that if a copyhold eftate is forfeited to the lord, or efcheats, or otherwife comes to the lord's hands, if the lord makes a leafe for years, or for life, or other eftate by deed, or without deed, that this land can never after be (f) regranted by copy, for the cuftom is destroyed, becaufe during fuch eftates, the land was not demifed nor demifable by copy of court-roll: fo if the lord makes a feoffment in fee thereof upon condition, and afterwards enters for the condition broke, yet it can never be regranted by copy; but if the lord keeps the land in his hands for a long time, or lets it at will, he, his heirs or affigns may well regrant it at his pleasure. So if the interruption is wrongful, as if the lord is diffeifed, and the diffeifor dies feifed, or if the land is recovered againft the lord by falfe verdict, or erroneous judgment, in thefe cafes, till the land is recovered, or the judgment reverfed by the lord of the manor, the land was not demifed, or demifable, and yet after the land is re-continued, it is grantable again by copy; for *non valet (g) impedimentum quod de jure non fortitur effectum, & quod contra legem fit pro infecto habetur*: but if the land fo forfeited, or efcheated before any new grant made is extended upon a ftatute, or recognizance acknowledged by the lord, or if the wife of the lord in a writ of dower has this land affigned to her, altho' thefe impediments are by acts in law, yet inafmuch as the interruptions are lawful, the lands can never after be granted by copy. If a copyholder accepts (h) a leafe for years of the lord of his copyhold, the

24.
M. 18 & 19 El.
in B. R.
Frenchie's cafe.

(f) 1 Rolle 498.
2 Syderf. 25, 140,
142. 1 Jones 449.
Dyer 414. pl. 61.
Cr. Car. 521.
Q. Rep. Q. Ann.
53. Co. Lit. 30. b.
5 Co. 84. See
2 Wilfon 135.
2 Co. 32.

(g) Co. Lit.
381. b.

8 Co. 63. b.

(h) 2 Co. 17. 2.
1 Rol. 510.
God. 101. Sav.
70, 71. 1 Brown.
32. 1 Anderf.
191. 1 Leon. 170.

copyhold,

(a) Sav. 70, 71.
3 Bullst. 81.
Godb. 34. Cr.
El. 7. Cr. Jac. 84.
God. 153.
Noy 12. Moor
185. 2 Syderf.
139. Cr. Car. 521.
(b) Moor 185.
2 Co. 17. a.

(c) 2 Syderf. 142.
Co. Lit. 58. b.

copyhold is destroyed for ever, and can never be granted again: if the copyholder (a) takes a lease for years of the manor, by *that* his copyhold has not continuance, as it was adjudged, *Pasch. 17 Eliz.* in (b) Hide's case: but in the same case it was resolved, that such lessee might regrant the copyhold again to whom he would, for the land was always demised or demisable; and if a copyhold is surrendered to the lessor of the manor, or is forfeited to him, he or his executors or assigns may well regrant it: and if a copyhold escheats to the lord, and he aliens the manor by fine, feoffment, or otherwise, his alienee may regrant the land by copy, for it was always demised or demisable: and by these resolutions you will better understand the general learning in Murrel's case before, concerning the second of the pillars of a copyhold, *sc.* (c) demised and demisable from time whereof, &c.

25.
M. 29 & 30 El.
Poiston & Crach-
roode in B. R.

(a) 6 Co. 60. b.
Hob. 86.
Cr. Jac. 665.
Cr. El. 353.
(b) Doct. pl. 81.
Moor 461.
Hob. 86.
Cr. Jac. 665.
Cr. El. 353, 390.
6 Co. 60. b.
Kelw. 77. a.
6 Mod. 19, 20.

(c) Doct. pla. 81.
Cr. El. 390.
Moor 461.
6 Co. 60. b.
Cr. Jac. 665.
9 Co. 113.

1 Salk. 365, 366.

Hob. 286.

THE case was, that a copyholder of certain tenements called Collins, parcel of the manor, &c. in pleading alledged, *quod infra maner' præd' talis habetur, necnon a toto tempore cujus contrarii memoria hominum non existit, habebatur consuetudo, (viz.) quod quilibet tenentes præd' tenementorum vocat' Collins, had used to have common in such a place parcel of the said manor; and if the custom might be alledged within the manor and applied to but one single copyhold was demurred in law. And it was adjudged, that such (a) custom as well for the form as for the matter of it, was good: for first, the copyholder in his own name cannot (b) prescribe, for the weakness and baseness of his estate; but if he will prescribe, he ought to prescribe in the name of the lord of the manor, *sc.* to say, that the lord of the manor and all his ancestors, and all those whose estate he has, have had common in such a place for him and his tenants at will, &c. as appears in 22 H. 6. 51. a. &c. and that shall serve when the copyholder claims common or other profit in the soil of a stranger: but when the copyholder claims common or other profit in the lord's soil, then he cannot (c) prescribe in the name of the lord; for the lord cannot prescribe to have common or other profit in his own soil; but then the copyholder, forasmuch as he cannot prescribe, neither in his own name, nor in the lord's name, he must of necessity alledge, that within the manor is such a custom as in the case at bar: and as when the copyholder claims common or other profit in the soil of the lord, he ought to claim it by custom of the manor; so when he claims it in the land of another which is not parcel of the manor, he cannot claim it by the custom of the manor, for the custom is, *quod infra maner' talis habetur, &c. consuetudo*, and therefore he cannot apply*

apply it, or by force thereof claim any thing out of the manor, as was done 21 Eliz. (a) Dyer, and therefore there it was clearly mispleaded; but in such case he ought to prescribe in the name of the lord.

(a) Dyer 363. pl.
27. 6 Co. 64. a.
1 Leon. 313.

Nota, a good (b) difference between prescription which is personal, and is always made in the name of a person certain and his ancestors, or those whose estate he has, and custom which is local and alledged in no person, but that within a manor, &c. is such custom, and that serves for them who cannot prescribe in their own name, nor in the name of any person certain, as inhabitants of a town, &c. as appears in 15 E. 4. 29. 40 Aff. 41. 2 Mar. Br. Prescription 100. 6 E. 6. Dyer 71. Also allegation of a custom shall serve when it is referred to a thing insensible, *sc.* that all such lands, &c. are devisable, or the like. *Vide* 40 Aff. 41. &c. And because in the case at bar the custom might have a lawful beginning, *sc.* that one copyholder only should have common, or estovers, or other profit in the land of the lord, and that in many manors, some copyholders had common in one waste of the manor, and others in another severally, so that the custom cannot be applied to all; and because all the other copyholders may be determined or extinct; for these reasons it was adjudged that the custom was well alledged in the case at bar, as well for the manner as for the matter; and such custom for one copyholder to have common of estovers in the lord's wood, parcel of the manor whereof the copyhold was held, was adjudged to be good. *Pasch.* 10 Eliz. as it was said in this case. *Vide* 21 E. 3. 34. 1 Mar. Dyer 114. 5 E. 6. Dyer 70, 71. And because it has been often said before, that the custom of the manor is the soul and life of the copyholders, it was necessary in my opinion to add this case, to shew how he shall alledge the custom, and when and how he shall prescribe.

(b) Hob. 285.
6 Co. 60. b.,
8 Co. 64. b.
Co. Lit. 113. b.
Co. Coph. 68,
&c.

Note, Custom is always local, *ut supra*, but Prescription is personal.

How a prescription may be laid in *tenentes & occupatores*. See Salk. 316.

[*Quære* the case of Woolnough *versus* Webber adjudged in Trinity term, 15 Geo. 3. in C. B. not yet reported in print. And see 2 Black. Com. ch. 6. fol. 95, 97.]

M I T T O N's Case.

Pasch. 26 Eliz.

QUEEN Elizabeth by her letters patent under the Great Seal constituted and granted the office of Clerk of the County-court, or Shire-clerk of the county of Somerset to Mitton, with all fees, &c. for term of his life: and afterwards the Queen constituted Arthur Hopton, Esq. Sheriff of the same county, who interrupted Mitton, claiming *that* which was mentioned to be granted to Mitton to be incident to his office of Sheriff, and thereupon he appointed a Clerk himself of the County-Court: Mitton thereupon complained to the lords of the council, who referred the consideration of the validity of the grant of the said office to the two Chief Justices, Wray and Anderson, before whom the matter was often debated: and Mitton's counsel argued, that the grant of the said office was good in law for divers reasons. 1. Because the County court is the Queen's Court, and in it, as to all actions and proceeding by *Justicies*, or other writ, or by plaint, the suitors are Judges, and the Sheriff but Minister, and as to outlawries, the (a) Coroners are Judges; and in proof thereof 6 E. 4. 3. b. 7 E. 4. 23. a. 39 H. 6. 5. a. 26 Aff. 45. were cited, and therefore it was concluded, that the Queen might in her own court appoint a County-clerk to enter the judgments and proceedings in the same court. 2. That Arthur Hopton (who was made Sheriff after the patent) could not avoid it; and principally, forasmuch as the Sheriff has his office but at the will of the Queen, which office she might at her pleasure determine in part or in all, and the Queen has granted the said office of Shire-clerk to Mitton for term of his life, and therefore the said Sheriff should not avoid it. 3. Mitton's counsel shewed two or three (b) precedents, by which it appeared, that such

(a) 9 Co. 119. a.
Co. Lit. 288. b.
Cr. El. 50.

(b) Hardr. 98.

such offices had been granted in the time of King H. 8. and after; and that was the substance of all which was said for the maintenance of all the said letters patent. And after many arguments (because the case concerned the validity of the Queen's grant) the two Chief Justices had conference with the other Justices, and upon consideration had of the letters patent, and of all that was said in maintenance of them, it was resolved by all the Justices *nullo contradicente, aut reluctante*, that the said letters patent were void in law; and the reasons and causes of their resolution were, 1. That the office of (a) a Sheriff is an ancient office which has had continuance long before the Conquest, and is an office of great trust and authority; for the King commits to him * *custodiam comitatus*, the custody and guard of the county; and when the King appoints a Sheriff *durante bene-placito*, although he may determine his office (b) at his pleasure, yet he cannot determine it in (c) part, as in one town, or hundred, or any other part, nor abridge the Sheriff of any thing incident, or appurtenant to his office, for the office is entire, and so ought to continue in its entirety without any fraction or diminution, unless it be by act of Parliament; or that the King makes some town, &c. a county of itself, and appoints a Sheriff and all things incident to a Sheriff within the same town; but cannot determine the office of Sheriff, or any part without making a new Sheriff, *sc.* for the execution and administration of Justice. And it was resolved, that the County-court, and the entering of all the proceedings in it are incident to the office of (d) Sheriffs, and therefore cannot by letters patent be divided from it: and although the said grant had been made to Mitton when the office of Sheriff was void, yet it had been void, and when the Queen has appointed a Sheriff, he shall avoid it. And so it was said it was adjudged in Scrogges's case, in the beginning of the reign of Queen Elizabeth, where the case was; that *tempore vacationis* of the office of Chief Justice of the Common Pleas, Queen Mary granted (e) the office of the Exigenter of London to Scrogges, and it was held void, because it was incident to the office of Chief Justice of the Common Pleas, which the Queen could not have, and the next C. J. shall avoid it. And as to the first objection it was answered, that in all writs directed to Sheriffs concerning the County-court, the King saith, *in comitatu tuo*; and in all returns of exigents made by him he saith, *ad comitatum meum tentum &c.* And the style of the court proves it also: and by the statute of 33 H. 8. cap. 13. it is provided by the K. the Lords Spiritual and Temporal, "and the Commons in Parl. assembled, that the Sheriff of the county of Denbigh shall keep

(a) Davis 60.
Co. Lit. 168. a.
Pref. 3 Rep.
p. 4, 5.
* 9 Co. 49. Co.
Lit. 168. a. Dalt.
Sher. 5, 6.

(b) Kelw. 47.
pl. 3. Dalt.
Sher. 6.

(d) 2 Rolles 74,
75. 2 Inst. 425.
2 Ventr. 269.
2 Syd. 140.

Vide this Case.
Dyer 2 Eliz. 175.
(e) 2 Ventr. 269.
1 And. 152, 153,
&c. pl. 25, 20.
Noy 51, 201.
Hob. 12, 17.
2 Inst. 425.
3 Bulstr. 49.
20 H. 6, 8.
20 E. 4, 13.
3 Black. Com.
chap. 4. fol. 35.
sect. 4.

(a) Antea 26. b.
Co. Lit. 58. a.
6 Co. 11. b.
8 Co. 60. b.
9 Co. 48. b. 49. a.
Godb. 49.
1 Rolles 543. Cr.
El. 792. Cr. Jac.
582. 4 Inst. 266,
268. 7 E. 4. 23. a.
21 E. 4. 66. b.
1 Mod. Rep. 171.
12 H. 7. 16, 17.
Br. Judges 18.
Br. Court Baron
9. B. N. C. 116.
(b) 1 Rolles 542.
(c) Cro. Arg. 75.
12 Co. 122. 130.
Hard. 122.
(d) F. N. B. 18. b.
Dyer 164. pl. 58.

(e) 6 Co. 11. b.

(f) Cawly 184.

(g) 6 H. 7. 2. b.
3. a.

" his Shire-court at the Shire-hall in the said county, &c." by which (as by many other parliaments) it appears, that the County or Shire-court is the court of the Sheriff, and although the suitors be there the Judges in some cases, yet *non sequitur* that the court doth not belong to the Sheriff, for in a Court Baron (a) the suitors are Judges, and yet the court belongs to the lord of the manor. As to the second objection *that* is answered before, because the County court is incident to the office of Sheriff, as the (b) Sheriff's turn is. As to the 3d objection it was answered, *quod* (c) *judicandum est legibus, non exemplis*. But for a general answer to all the said objections, and all others which may be made, it was said, that great inconvenience would ensue to Sheriffs, who are great and ancient officers and ministers of Justice, if such grant should be of validity, for by such, as well, the entering of all proceedings in the same court, as the custody of the entries and rolls thereof do belong to the office of Sheriff, and *that* is well proved by the writ of (d) *false judgment*, of an erroneous judgment given in the County-court, the form of which writ is such; *Jacobus, &c. Vic' S. salutem, si A. fecerit, &c. tunc in pleno com' tuo recordari facias loquelam, which is, in eodem comitatu per breve nostrum de reſto, inter A. petentem, &c. unde idem A. queritur falsum sibi factum fuisse judicium in eodem com', & record' illud habeas coram justiciariis nostris apud Westm' &c. sub sigillo tuo, & per quatuor legales milites ejusdem com' ex illis qui recordo illo interfuer' &c.* And this also appears by the precept of a tolt which the Sheriff makes to remove a plea in any Court Baron before him into his county, the words of the precept are, *et loquelam &c. tollas, & summonneas, &c. prædict' f. quod sit ad comitatum meum S. scil. die Lunæ &c. tenend.* And in all writs to remove any plea out of the county into the Common Pleas, the King calls the County-court the (e) Sheriff's Court; and if the Sheriffs do not certify by force of such writs the record, then at last shall issue process of contempt: and if the record be imbezzelled, the Sheriff shall answer for it, and therefore it would be full of danger and damage to Sheriffs, if others should be appointed to keep the entries and rolls of the County-court, and yet the Sheriff (f) should answer for them as immediate officer to the court, and therefore the Sheriff shall appoint clerks under him in his County-court, for whom he shall answer at his peril; the same law of the (g) Sheriff's turn: and law and reason require, that the Sheriff who is a public officer and minister of justice, and who has an office of such eminency, confidence, peril, and charge, ought to have all rights appertaining to his office, and ought to be favoured in law before any private person for his singular

gular benefit and avail. Mich. 39 & 40 Eliz. at Serjeant's inn in Fleet-street it was resolved by Popham and Anderson Chief Justices, and all the Justices of England, that the custody of the (a) gaols of the counties, of right belongs and is annexed and incident by the law to the office of Sheriffs, and *that* well appears by the judgment in parliament *anno* 14 E. 3. cap. 10. by which it is ordained and enacted, that all gaols of counties shall be rejoined to Sheriffs, and the Sheriffs shall have the custody of the same gaols, as always before this time they were wont to have; and that they shall put *in* such keepers for whom they will answer. Upon which it was resolved by all the Justices, that the grants of the custodies of the gaols of counties (now lately, either by King H. 8. or after, granted to sundry persons) were utterly void: and forasmuch as the custody of them belongs to the office of Sheriff, who being immediate officer to the King's courts, shall answer for escapes, and shall be subject to amercements if he has not the body in court upon process directed to him, &c. it is reason that he shall put *in* such keepers of the said gaols for whom he will answer, according to the purview of the said act of 14 E. 3. and therefore it would be against all reason, that he should answer for escapes out of the said gaols, and that he should be subject to amercements for not having the bodies of prisoners, &c. and yet another should have the keeping and custody of the gaol: which resolution agrees in reason with the said resolution in Mitton's case, and therefore I have added it in this place.

(a) Mich. 39 &
40 Eliz. Case of
Gaolers. 2 Roll.
75. 3 Co. 44. a.
3 Inst. 92.
1 And. 345, 346.
Raym. 423, 428.

[See 1 Black. Com. ch. 9. fol. 339, &c. of Sheriffs]

B O Z O U N's Case.

Mich. 26 & 27 Eliz.

In the King's Bench.

Godb. 35, 36,
37. 2 Roll. 192,
193.

THE case between Futter plaintiff, and Bozoun and others defendants, as it was found by special verdict, was such; a portion of tithes in Longham in the county of Norfolk, appertaining to the rectory of Gresenhall, which was a rectory presentable, and all the other tithes in Longham were parcel of the rectory of Longham, which was appropriated to the late monastery of Wendling within the same county; of which rectory of Longham Queen Elizabeth was seised in her demesne as of fee, in right of her crown; and by her letters patent, bearing date 26 *Januarii, anno 12 Eliz. ex gratia speciali, certa scientia, & mero motu*, granted to Nicaius Yertefworth and Bartholomew Brookesby and to their heirs, *totam illam portionem decimarum & garbarum suarum in Longham in com' Norf. cum omnibus aliis decimis suis quibuscunque in Longham, in dicto com' Norf. tunc vel nuper in occupatione Johannis Corbet*; and further granted by the said letters patent, that they should be of force and effect against the Queen, her heirs and successors, *non obstante malè nominando, vel malè recitando præd' portionem decimar' & aliorum præmissor'*; *et non obstante aliquibus aliis defectis in non nominando, vel malè recitando, vel non nominando alicujus tenentis sive occupatoris*. And it was further found by the jurors, that the said John Corbet never had any tithes in Longham in his occupation; and if all the tithes in Longham parcel of the said rectory of Longham should pass by the said letters patent, or not, was the question: in this case 4 questions were moved; 1. Whether the last words, *sc. in the occupation of J. C.* should refer to the first words, *sc. tot' ill' portion' decimar' & garbar' suarum*

suarum in Longham in dicto com' Norf. or only to the latter words, *sc. cum omnibus aliis decimis &c.* 2. When the Queen granted *totam illam portionem decimarum & garbarum in Longham*, if the tithes which were parcel of the rectory of Longham should pass? 3. If the said first words, *totam illam portionem decimarum*, were so certain that the last words being false, should not make the grant, but the superfluous words void? 4. If the *non obstante* shall supply the defect of the mistaking of the farmer? As to the first, it was resolved by Sir Christopher Wray, Chief Justice, Sir Thomas Gawdy, & *totam curiam*, that the last words refer to the whole sentence: 1. Because the words are, *totam illam portionem decimarum & garbarum suarum &c.* so that this pronoun (*illam*) shews plainly that there ought to be words subsequent to explain and reduce into (a) certainty, what portion by the Queen's intent shall be granted, *sc. that* which was in occupation of John Corbet, and therefore this pronoun (*illam*) is not satisfied till it is come to the full end of the sentence. 2. This conjunction, *cum omnibus aliis decimis suis, &c.* couples the latter words to the former, and makes the words subsequent refer to the whole sentence. 3. If the first words would convey all the tithes of the said rectory, then the addition of the occupation of John Corbet to the subsequent words would be vain and nugatory; *et (b) maledicta expositio est quæ corrumpit textum.* As to the second question, it was resolved, that this word (c) (*portio*) properly signifies a part or portion in gross divided, and not parcel of the rectory of Longham; and in the case at bar, the Queen had not any portion of tithes in gross, but all were parcel of the rectory: and although the Queen's grant is, *ex gratia speciali, certa scientia, & mero motu*, yet *that* will not extend the Queen's grant against her intent and meaning expressed in her grant, nor by any strained construction make any thing pass against the apt and proper signification, or at least the common and usual intendment of the words of her grant, and as well the proper and apt signification, as the usual intendment of a portion of tithes, is of tithes in gross, and not parcel of the rectory, and therefore no tithes parcel of the rectory in the case at bar shall pass. And as to the 3d point, when the Queen granted *totam illam portionem, &c. adtunc vel nuper in occupatione Johannis Corbet*, and Corbet had no tithes there, it was resolved, that nothing (d) past thereby: for admitting that this word (*portio*) shall be taken for a part, then the effect of the grant is, *totam ill' partem decimar' nostr' in occupatione J. Corbet*, and in truth he had never any part, without question nothing shall pass for the uncertainty, if it was in the case of a common person,

(a) Cro. Car.
548. Moor 459
Palm. 83.

(b) 2 Co. 24. a.
8 Co. 56. b.
154. b. 3 Bullstr.
105, 107, 108.
8 Roll. Rep. 310.
(c) Godb. 35.
3 Keb. 413.

(d) Lit. Rep. 63.
66. 2 Roll. 162.
103. Cro. Jac.
48, 320. Lane
11, 111. Poph.
60. Mo. 755.
3 Keb. 413. Hard.
225. 2 Roll. Rep.
118. Godb. 423.
2 Co. 33. a.
3 Co. 10. a.
10 Co. 113. a.

a fortiori in the Queen's Case. As to the last point, these two differences were taken and resolved by the court, *sc.* when a clause of *non obstante* shall make the Queen's grant good, when not. 1. When the Queen by the common law cannot in any manner make a grant, there a (*a*) *non obstante* of the common law will not, against the reason of the common law, make the grant good; but when the Queen may lawfully by the common law make the grant, but the common law requires that she should be so instructed, that she be not deceived, there a (*b*) *non obstante* supplying it, stands with the reason of the common law, and shall make the grant good. And therefore if the King grants (*c*) a protection in a *quare impedit*, or assise, with *non obstante* of, any law to the contrary, this grant is void; for, by the common law, protection doth not lie in either of those cases, for the loss which may happen to the plaintiff by such great delay, and therefore the *non obstante* cannot avail, when by the common law the King cannot grant it for the reason aforesaid, as it is ruled in 39 H. 6. 39. a. But when the King makes a lease for life, or for years, he has the reversion in him which he may lawfully grant; but the law requires that the King in this case be not deceived in his estate, *sc.* to grant the possession of the land, where he has but the reversion: and therefore when he (*d*) grants the land, notwithstanding (*e*) that it be in lease for life, or years, of record or otherwise, or if he grants the land, (*f*) and further grants the reversion of it dependent or expectant upon any estate for life or for years, in both these cases the grant is good; first, because it stands with the reason of the common law, *sc.* that the King be not deceived in his grant. 2. In some case it may be doubtful whether the lease in possession be good or not; and if the King recites it, and grants the reversion, and afterwards it should be determined by judgment in law that the lease was void, the grant will be void also, which often trenches to the disinherison of the patentee, which hazard is avoided by this resolution. 3. Admitting that all the leases be good, if they all ought to be recited, or otherwise the letters patents should be void: 1. It would be great danger to the patentee, if he omits or misrecites any of them. 2. Greater danger if any lease be not enrolled: 3. Great charge in search for them, and greater charge in recital of them, which in some cases draws the letters patent to such infinite length, that they deserve to be called *elephantini libri*; and all this danger, charge, and prolixity is helped by this resolution. 2. When the words of the grant are not sufficient *ex vi termini* to pass the thing granted, but the grant is utterly void, there a *non obstante* cannot make the grant good: as in the case at bar, the King grants *totam illam portionem*

(a) Div. 75, 76.
Vaugh. 334.
2 Roll. Rep. 17.
215. Hard. 110,
152.

(b) Hob. 229.
2 Roll. Rep. 359.
(c) Co. Lit.
131. a. 10 H. 4.
6. a. 27 H. 6. 1. b.
39 H. 6. 39. a.
1 Roll. 323. Br.
Protection 8.
Fitz. Effoign
185. 43. Aff. 21.
per Thorp.
8 Co. 50. a.

(d) 2 Roll. 190.
(e) Cro. Car.
108. Hob. 229.
(f) 2 Roll. 181.
1 And. 46.

portionem decimarum in Longham, nuper in tenura J. C. here the addition of J. C. as has been said, is of the substance of the grant, and because J. C. never had any portion there, the grant is void *ex vi termini*, and therefore a *non obstante* cannot make it good: but in case of a grant of land which is in lease for life, or for years, there, by the grant of the land, the words are sufficient *ex vi termini* to make the reversion pass; but the law requires that the Queen be not deceived in the thing which she grants, and that is supplied by the *non obstante*: and so the case of the reversion which was strongly urged of the plaintiff's part, is upon evident reason answered and resolved. Will. Daniel and Robert Snagge were of counsel with the plaintiff, and Godfrey and Coke with the defendant. And the said letters patent were not made good by the statute of 18 Eliz. cap. 2. for they were patents of (a) concealments, and therefore by express proviso excepted out of the said act.

(a) 3 Co. 76. b.
10 Co. 109.

TYRRINGHAM's Case.

Mich. 26 & 27 Eliz.

In the King's Bench.

13 Co. 66.
2 Brownl. 47.

IN trespass between Pheasant plaintiff, and Salmon defendant, the case was such; Tho. Tyrringham was seised of an house, 44 acres of land, 7 acres of meadow, and 2 acres of pasture, in Titchmersh in the county of Northampton; to which house, land, meadow and pasture, he and all those whose estate he had, had used to have common of pasture for oxen, cows, and heifers levant and couchant upon the house, land, meadow, and pasture, as well in 30 acres of land in the same town, (whereof one John Pickering was then seised in fee) as in 40 acres of land and pasture in Titchmersh aforesaid (whereof one Boniface Pickering was then seised in fee) as to the said house, land, meadow, and pasture appertaining. And afterwards the said Boniface Pickering being seised as aforesaid, of the said 40 acres, purchased to him and his heirs the said house, 44 acres of land, 7 acres of meadow, and two acres of pasture, to which, &c. and being so seised as well of the said 40 acres in which, as of the said tenements to which, &c. demised the house, land, meadow, and pasture to which, &c. to Pheasant, who put in two cows into the said 30 acres to use the said common, and the said Salmon who was farmer of the said John Pickering, with a little dog, *leviter & moliter* drove out the said cows, and the said Pheasant brought his action of trespass for chasing his cattle. In this case divers points were resolved by Wray C. J. Sir Thomas Gawdy, & *totam curiam*. First, that prescription doth not make a thing appendant, unless the thing which shall be appendant agrees in quality and nature to the thing to which it shall be appendant; as a thing corporate cannot be appendant to a thing (a) corporate, nor a thing incorporate to a thing incorporate, as it is held

(a) Co. Lit.
121. b. 122. a
1 Roll. 230.
Plowd. 85. b.
170. a. Godb.
353.

held in Hill and Granges's case, Plow. Com. 168. a. b. But a thing incorporate, as an advowson, may be to a thing corporate as to a manor; or a thing corporate as land, to a thing incorporate as an (a) office, as it is there also held: but every thing incorporate cannot be appendant to a thing corporate; as common of (b) turbary cannot be appendant to land, but to an house, as it is held in 5 Aff. 9. for the thing which is appendant ought to agree with the nature and quality of the thing to which it is appendant, and turfs are to be spent in an house: so 10 E. 3. 5. (c) a leet cannot be appendant to a church or chapel, for they are of several natures. The beginning of common appendant by the ancient law was in such manner; when a lord (d) enfeoffed another of arable land, to hold of him in socage, *i. e.* (e) *per servitium socæ*, as every such tenure at the beginning (as Littleton saith) was, that the feoffee *ad manutenendum servitium socæ*, should have common in the lord's wastes for his necessary cattle which plowed and manured his land, and that for two reasons, 1. Because it was, as it was then held, *tacite* implied in the feoffment, for the feoffee could not plough and manure his land without cattle, and they could not be kept without pasture, & *per consequens* the feoffee should have (as a thing necessary and incident) common in the lord's wastes and land, and that appears by the ancient books in *temp.* E. 1 * Common 24. & 17 E. 2. Common 23. & 20 E. 3. Admeasurement 8. & 18 E. 3. and by the rehearsal of the statute of Merton, (f) cap. 4. The 2d reason was for the maintenance and advancement of (g) tillage, which is much respected and favoured in law; so that such common appendant is of common right, and commences by operation of law, and in favour of tillage, and therefore it is not necessary to (h) prescribe therein, as it is held in (i) 4 H. 6. & 22 (k) H. 6. as it would be if it was against common right; but it is only appendant to ancient land arable hide and gain, and only for cattle, *sc.* horses and oxen to plow his land, and cows and sheep to manure his land, and all for the bettering and advancement of tillage, and with this resolution agree (l) 37 H. 6. 34. a. b. *per tot' cur'* & 26 (m) H. 8. 4. a. as to this latter point, and therefore it is against the nature of common appendant, to be appendant to meadow or pasture; and because in the case at bar the prescription was to have common appendant from time whereof, &c. to an house, meadow, and pasture, as well as to arable land, by which it appears to the court that there had been an house, meadow, and pasture, from time whereof, &c. it was therefore resolved, that this common was appurtenant and not appendant. But if a man has had common for cattle which serve for his plough appendant to his land, and perhaps of late time an house is built upon

(a) Plowd. 162.
a. 169. a. Dav.
34. a. Co. Lit.
121. b. Dyer 71.
pl. 43. 1 H. 7.
29. a. 1 Roll. 230.
(b) Co. Lit.
121. b. Br.
Common 36.
(c) Co. Lit.
121. b. 1 Roll.
230.
(d) 2 Inst. 85.
86.
(e) Lit. sect.
119. Co. Lit.
89. b.
2 Black. Com.
ch. 3. fol. 33.

* 2 Inst. 86.
Postea 38. a.
(f) 2 Brownl.
298. 2 Inst. 85.
2 Co. 25. b.
(g) 2 Inst. 86.
2 Brownlow
297, 298.

(h) Co. Lit.
122. a. Cio. Car.
542. 4 H. 6. 13.
a. Br. Common
11, 34. Br. Pre-
scription 23, 30.
Dyer 299. pl. 32.
22 H. 6. 10. a.
(i) 4 H. 6. 13. a.
(k) 22 H. 6.
10. a.
(l) Br. Common
13.
(m) Br. Com-
mon 1.

(a) Co. Lit. 4. a.

(b) 9 Co. 124.
a. Plowd. 168.
b. Co. Lit. 69.
a. 2 Brownl.
297.

(c) 8 Co. 79. a.
Hob. 25. 1 Rol.
234. Co. Lit.
122 a. 2 Brownl.
297, 298.
Co. Lit. 122. a.

F. N. B. 180. L.

part, and some part is employed to pasture, and some for meadow, and that for maintenance of tillage which was the original cause of the common, in this case the common remains appendant, and shall be intended, in respect of the continual usage of the common for cattle levant and couchant upon such land, at the beginning all was arable, but in pleading he ought to prescribe to have it appendant to land, and although (a) *terra dicitur a terendo, quia vomere teritur*, yet *terra* includes all, and although now it is pasture or meadow, yet it is arable, *id est*, may be ploughed, although it is not now in tillage and ploughed: but if he prescribes to have it appendant to an house, or meadow, or pasture, then it appears, of his own shewing, (as hath been said) that it had been at all times an house, meadow, and pasture, and then he cannot have common as appendant to it, but such is common appurtenant. A man may prescribe to have common appendant to his manor, for all the demesnes shall be intended arable, or at least shall be in construction of law *reddendo singula singulis* appendant to such demesnes as are ancient arable land, and not to any land newly ploughed and improved to be arable out of his wastes and moors parcel of the manor, and therewith agrees 5 Aff. 2. Also when a man claims common appendant to his manor, no incongruity, as in the case at bar appears of his own shewing. So common may be claimed to be appendant to a carve of land, and yet (b) a carve of land may contain pasture, meadow, and wood, as it is held in 6 E. 3. 42. but no incongruity appears there, and it shall be applied to *that* which agrees with the nature and quality of a common appendant. 2. It was resolved that common appendant may be apportioned for two reasons: 1. Because it is of common right, and therefore if the commoner purchases parcel of the land in which, &c. yet the common shall be apportioned; as if the lord purchases parcel of the tenancy, the rent shall be apportioned: so if A. has common appendant to 20 acres of land, and enfeoffs B. of part of the said 20 acres to which, &c. this common shall be (c) apportioned, and B. shall have common *pro rata*. And where it was objected, 1. that the prescription fails in both the cases; for in the first case he never had common in part of the land only, but entirely in all; and it would be now a prejudice to the terretenant if he should have common in the 30 acres only for all the cattle levant and couchant upon all the tenements to which, &c. And in the latter case, no common was ever appendant to part of the land, but entirely to the whole: also, 2. In assise of common all the terretenants ought to be named, and that cannot be when the commoner himself has purchased part of the land. As to these objections, it was answered and resolved, that as to the 1st, the prescrip. ought to be special, *sc.*

to prescribe to have common in the whole till such a day, and then to shew the purchase of part, and from that time that he has put *in* his cattle into the residue *pro rata portione*; as in the cases, when a corporation has liberties by prescription, and within time of memory the corporation is altered, there ought to be a special prescription; as to the second case, *sc.* when part of the land to which, &c. is aliened, there, every of them may prescribe to have common for cattle levant and couchant upon his land, and in none of these cases any prejudice accrues to the tenant of the land in which the common is to be had, for he shall not be charged with more upon the matter than he was before the severance; and God forbid the law should not be so, when part of the land to which, &c. is aliened; for otherwise many commons in England (which God forbid) would be annihilated and lost: and it was agreed, that such common which is admeasurable, shall remain after the severance of part of the land to which, &c. But in the case at bar, forasmuch as the court resolved, that the common was appurtenant and not appendant, and so against common right, it was adjudged, that by the said purchase (a) all the common was extinct; for in such case, common appurtenant cannot be extinct in part, and be *in esse* for part by the act of the parties. And as to the last objection, it was answered and resolved, that if upon the matter the common appendant should be apportioned, then the terre-tenant should be only named out of the land charged with the residue of the common, as in case where a rent-charge is apportioned in case of descent, the tenant of the land shall be only named out of which the residue of the rent which remains issues. And it was said, in this case this word (b) (*pertinens*) is Latin as well for appurtenant as for appendant, and therefore *subiecta materia*, and the circumstance of the case ought to direct the court to judge the common to be appendant, or appurtenant. 3. It was resolved, that (c) unity of possession of the whole land to which, &c. and of the whole land, in which, &c. makes extinguishment of common appendant against the opinions 11 E. 3. Common (d) 11. 14 Aff. 21. 15 Aff. 2. 20 E. 3. (e) Admeasurement 8. The reason of which opinions was, because the land to which the common was claimed was ancient land hide and gain, and for maintenance and advancement of tillage, but inasmuch as it was against a rule in law, *sc.* when a man has as high and perdurable estate as well in the land as in the rent, common, and other profit issuing out of the same land, there the rent, common, and profit is extinct, and therewith agrees 24 E. 3. 25. 4. In this case Wray C. J. said, that common for cause of vicinage is not common appendant, but inasmuch as it ought to be by prescription, from time whereof, &c. as common appendant ought, it is in this respect resembled to com. appendant; but com. appurtenant and in
gros,

4 Co. 87. b.

(a) Co. Lit. 122.

a. Hob. 25, 235.

8 Co. 72. a. 79.

a. Winch. 45.

Hut. 58. Cro.

El. 594. Cro.

Car. 483.

1 Jones 397.

2 Brownl. 998.

(b) Co. Lit.

221. b. 2 Inst.

86. a.

(c) Cro. El. 570.

Moor 462.

Poph. 166.

Owen 122. 2

Brownl. 47, 297.

2 Sid. 111.

(d) Antea 27. a.

2 Inst. 86.

(e) 2 Inst. 86.

7 E. 4. 26. a.

&c. per Littleton.

4 E. 4. 1. b.

(a) Co. Lit.
121. b.

(b) Dy. 316. pl.
4. Co. 5. a. b.
Co. Lit. 122. 2.
1 Roll. 399.
13 H. 7. 13. b.
14. a. 8 E. 4.
5. a.

(c) 13 Co. 38.
Co. Lit. 78. b.
2 Inst. 203. Dav.
3. a. Mo. 181.
15 E. 4. 3. b.
(d) Poph. 162.
2 Roll. 566.
Smith's case,

(e) Co. Lit.
122. 2.

(f) 13 H. 7. 13.
b.

(g) Co. Lit.
85. b.

grofs, may commence either at this (a) day by grant, or be by prescription. And Wray Chief Justice further said, that in case of common for cause of vicinage, the one may enclose (b) against the other, for he who has such common cannot put his cattle into the land of the other, but he ought to put them in the land where he has common, and if they stray into the other land, they are excused of trespass, by reason of the ancient usage which the law allows to avoid suits which would arise, if actions should be brought for every such trespass, when no separation or inclosure is between the commons, and therefore he said, that one may enclose against the other, for (c) *cessante causa cessat effectus*. 5. It was resolved without any difficulty, that when the plaintiff's cattle came into the defendant's land, and did him trespass, the defendant (d) with a little dog might chase them out, and should not be compelled to distrain them damage feasant. *Nota* reader, according to the said opinion of Wray C. J. it was now lately adjudged in the King's Bench, between Smith pl. and How and Redman defts. where the case was; that two lords of two several manors had two wastes adjoining (parcels of their manors joining) without inclosure or separation, and yet the bounds of each manor was well known by certain bounds and marks, in which wastes the tenants of the one manor, and of the other, had reciprocally common for cause of vicinage; in that case one may enclose (e) against the other, and thereby utterly toll the common for cause of vicinage: against which, two objections were made. 1. Because it had been used by prescription from time whereof, &c. the beginning of which cannot be known, it would be hard now to break *that* which has had such continuance; for as it is said, *obtemperandum est consuetudini rationabili tanquam legi*. 2. Perhaps the waste of one was greater or of greater value than the other, and probably those who had the less at the beginning gave (f) recompence to have his common in the greater, and therefore it would be now unreasonable to undo or defeat it. As to these it was answered and resolved, that the prescription imports the reciprocal cause in itself, *sc.* for cause of vicinage, and no other cause can be imagined; and forasmuch as it is *potius* an excuse of trespass, when the cattle of the tenants of the one manor stray into the waste of the other manor, than any certain inheritance; for it was resolved clearly, that the tenants of the one manor could not put their beasts into the wastes of the other manor, but they should come there only by escape, and that the inclosure is only to prevent the escape of the cattle (which is a lawful act;) for these reasons it was adjudged, that the one might inclose against the other.

Nota reader, it is true that (g) agriculture and tillage is greatly

greatly respected and favoured as well by the common law, as by the common assent of the King, Lords Spiritual and Temporal and all the Commons in many parliaments. 1. The common law prefers arable (*a*) land before all other, and therefore for its dignity it ought to be named in a *præcipe* before meadow, pasture, wood, or any other soil; and it appears by the statute of 4. H. 7. cap. 19. that six (*b*) inconveniencies are introduced by subversion or conversion of arable land into pasture, tending to two deplorable consequences. The first inconvenience is the increase of (*c*) idleness, the root and cause of all mischiefs. 2. Depopulation and decrease of populous towns, and maintenance only of two or three herdsmen, who keep beasts, in lieu of great numbers of strong and able men. 3. Churches for want of inhabitants run to ruin and are destroyed. 4. The service of God neglected. 5. Injury and wrong done to patrons and curates. 6. The defence of the land for want of men strong and enured to labour against foreign enemies, weakened and impaired. The (*d*) two consequences are: 1. These inconveniencies tend to the great displeasure of God. 2. To the subversion of the policy and good government of the land, and all this by decay of agriculture, which is there said to be one of the greatest commodities of this realm, which one act of parliament as to this purpose may, as a figure in arithmetick, in the 3d place stand for an hundred: but I have observed that the most excellent policy, and assured means to increase and advance agriculture, is to provide that corn shall be of a reasonable and competent value; for make what statutes you please, if the plowman has not a competent profit for his excessive labour and great charge, he will not employ his labour and charge without a reasonable gain to support himself and his poor family.

(*a*) F. N. B. 2.
c. Plowd. 169. a.
11 Co. 55.

(*b*) Co. Lit. 85.
b.

(*c*) Co. Lit. 85.
b.

(*d*) Co. Lit. 85.
b.

Ncta Bene;

Appellum quid,
vid. Co. Lit.
287. b.

C A S E S

O F

APPEALS and INDICTMENTS, &c.

I.

HJ. 28. El. in
B. R. Brook's
case. 2 Leon.
83.
• 9 E. 4. 26. b.
Br. Indictm. 7.
Cr. Jac. 20.
(a) Cr. El. 920.
5 Co. 121. a.
11 Co. 32. a.
Doct. pla. 84.
Hales pl. Cor.
84. 207.
1 Salk. 686.
3 Salk. 30.
1 Co. Lit. 123.
b. 287. b.
(b) 9 E. 4. 26.
a. b. Co. Lit.
124. a. Stanf.
Cor. 24. a. 82. a.
Hales pl. Cor.
187. 207. Fitz.
Indictm. 18. Br.
Indictment 7.
1 H. 6. 1. a.
20 H. 7. 7. a.
Br. Rape 4.
Br. Appeal 48.
Fitz. Cor. 1.
Cr. Jac. 20.
Poph. 42.
(c) Co. Lit. 50. b.
51. b.
1 Rol. 814. b.
9 E. 4. 21. b.
Perk. sect. 253.
19 H. 6. 27. a.
Br. Eschange 12.
10 Co. 24. a.
b. 10 Co. 24. a.

RICHARD Vaux brought * appeal of burglary against Thomas Brooke, and counted that the defendant *domum mansionalem præd' Richardi Vaux felonice & burgaliter fregit, &c.* The defendant pleaded not guilty, and by a jury of the county of Bucks, which appeared this term at the bar, he was convicted of the felony and burglary aforesaid; and the defendant's counsel moved in arrest of judgment, that the count was insufficient, because the said word *burgaliter* was of no signification, but the count ought to be *burglariter*, or *burgulariter*, and the offence is called burglary, or burgulary, and not burgalry, for there wants an *l* between *g* and *a*, and in the latter syllable *l* is inserted in lieu of *r*, and *burglariter* (a) *est vox artis*, as *felonice* + *murdravit*, (b) *rapuit*, (c) *excambium*, (d) *warrantizare*, (e) *frankalmoign*, (f) *frank-marriage*, and several others which cannot be expressed by any periphrasis or circumlocution; and this word (*burglary*) is derived from these two words *burgh* and *laron*, and therefore burglary or burgulary is sufficient, but not burgalry, for that wants sense; and many precedents warrant *burgulariter* to be good, but none was found to warrant *burgaliter*: and upon this exception *curia advisare vult* till next term; and in the mean time the plaintiff died, and that was shewn to the court by the defendant's counsel as *amicus curiæ*, and made manifest by sufficient testimony; and thereupon the court moved, that forasmuch as for this felony and burglary he was once convicted at the suit of the party, he could never be charged with the same offence at the suit of the K. that he might be thereof discharged, and upon that the court took advice: and it was resolved, that if the count had been

(d) Lit. sect. 733. Co. Lit. 9. a. 383. b. 384. a. 10 Co. 24. a. (e) Co. Lit. 94. a. (f) 10 Co. 24. a. Co. Lit. 21. b. (g) Præf. Cr. Car. 3. a. (h) 3 Inst. 63.

been sufficient, then being convicted at the suit of the party, he should not be again impeached at the suit of the king; but it was resolved, that the count was insufficient, and thereupon he was discharged: and in this case upon the evidence, Wray Chief Justice said, that if a man has a mansion-house, and he and his whole family upon some accident are part of the night (a) out of the house, and in the mean time one comes and breaks the house to commit felony, that this is burglary, for though neither the owner nor any of his family be in the house yet it is *domus mansionalis*; and the words of the appeal or indictment of burglary are, *domum mansionalem præd' R. V. fregit, &c.* And according to this opinion it was resolved, Hil. 38 *Reginæ* Eliz. by Popham Chief Justice, and all the Justices; that where a man has (b) two houses, and dwells sometimes in the one and sometimes in the other, and has a family or servants in both, and in the night when his servants are out of the house, the house is broke by thieves, that this is burglary for the said reason which Wray Chief Justice gave.

Pleas of another action pending.
See 6 Mod. 157.
&c. ib. 5 Co. 32.
Quære.

(a) Mo. 660,
661. Hales pl.
Cor. 82. 3 Inst.
64. Poph. 42.

(b) Hales pl.
Cor. 82. Mo.
661. Poph. 52.

WETHEREL (c) brought an appeal against Darly of murder, the def. pleaded not guilty, and was found guilty of (d) homicide, and had his clergy; and afterwards was indicted of murder, and thereupon arraigned at the suit of the Queen, and he pleaded the former (e) conviction in the appeal at the suit of the party; and it was adjudged a good bar, and thereupon he was discharged, for it was a good bar by the common law, and restrained by no statute, and the reason is, because a man's life shall not be (f) twice put in jeopardy for one and the same offence.

2.
Pasch. 25 Eliz.
Darly's case.
(c) Cr. El. 296.
(d) Hal. pl. Cor.
267. Co. Lit.
282. a. Cr. El.
276, 296, 465.
Moor 407.
(e) 3 Inst. 214.
(f) Postea 43.
a. 45. a. 47. a.

AT the assizes held at Suffex 25 Febr' anno 28 Eliz. before the Justices of assize H. Yong, W. Garland, and others, were indicted, *de eo quod ipsi sexto Augusti, anno 27 Eliz. vi et armis, videlicet, gladiis, &c. apud Lewes prædiel' ex malitiis suis præcogitatis in quendam Thomam Butcher, nuper de Lewes, &c. yeoman, adtunc & ibidem in pace Dei & dictæ Dom' Reginæ exist' insultum & affraiam fecerunt, & præd' W. Garland cum uno gladio de ferro & chalibi ad valentiam quinque solidorum, quem idem Willihelmus in manu sua dextra adtunc & ibidem habuit & tenuit, violentè & felonice, & ex malitia sua præcogitata præfatum Thomas Butcher adtunc & ibidem percussit, dans eidem Thomæ Butcher adtunc & ibidem unam plagam mortalem*

VOL. II.

T

talem

3.
Suffex.
Trin' 28 Eliz.
Yong's case.
Carth. 332.
Skinner 443.

talem super faciem ipsius T. Butcher, & cum præd' gladio amputavit nasum suum a facie sua, partem labiorum suorum, ac partem menti sui voc' the chin. Et præd' Henricus Yong cum quodam alio gladio, &c. (ut supra) præf' T. Butcher adtunc & ibid' percussit (a) & perforavit, dans eidem T. Butcher adtunc & ibid' unam aliam plagam mortalem circiter pectus usque ad ossa humer' ipsius T. Butcher, latitudinis unius pollicis & dimid' & profunditatis septem pollicium, de quibus quidem plagis & vulneribus sic per præf' W. G. & H. Y. in forma prædict' prius dat', dictus T. Butcher eodem sexto die Augusti, anno 27 suprad' apud Lewes præd' in com' præd' instant' obiit, & præd' Thomas Brewer præd' sexto die Augusti, anno 27 supradicto, apud Lewes præd' in com' præd' ex malitia sua præcogitata fuit felonice præsens, abettans, procurans, confortans, & auxilians præfatos H. Y. & W. G. ad feloniam & murdrum præd' in forma præd' faciend' exequend' & perpetrand' contra pacem dictæ Dom' Regine coronam & dignitatem suam; & sic juratores præd' dicunt super sacramentum suum quod præd' H. Y. W. G. & Thomas Brewer præfati Thomam Butcher præd' sexto die Augusti, anno 27 supradicto, apud Lewes præd' in com' præd' felonice & ex malitiis suis præcogitat' modo & forma præd' interfecer' & murderaverunt contra pacem, &c. And it was moved that this indictment was insufficient, because unam plagam mortal' (b) circiter pectus, was altogether uncertain, for it might be in the neck, or in the arm, or in the belly, and indictments ought to express in certain as well as in what part the mortal wound is, as the depth and breadth of it, that it may appear to the court to be mortal, and because it is said, that he died *de vulneribus & plagis præd'* and one of them is uncertainly alledged, it makes the indictment insufficient as to all; *quod fuit concessum per totam curiam*: and it was said that the indictment ought to have been, that if the party did not die of the first wound, that he died of the other wound, and that is the common course; *ad quod non fuit responsum*: and in this case it was held *per totam curiam* that if upon an affray the constable and (c) others, in his assistance, come to suppress the affray, and preserve the peace, and in executing their office the constable or any of his assistants is killed, it is murder in law, although the murderer knew not the party that was killed, and although the affray was sudden, because the constable and his assistants came by authority of law to keep the peace and prevent the danger which might ensue by the breach of it; and therefore the law will adjudge it murder, and that the murderer had malice prepense, because he set himself against the justice of the realm: so if the Sheriff or any of his Bailiffs or other officers

(a) 1 Bulstr. 80.

(b) Postea 41. a.

1 Bulstr. 80.

2 Bulstr. 328.

1 Rol. Rep. 237.

2 Inst. 318.

(c) 9 Co. 66. a.

Jenk. Cent 291.

Cr. Jac. 280.

3 Inst. 52.

Hales pl. Cor.

45. 9 Co. 67. b.

Rep. Q. A. 242,

243, &c.

officers is killed in executing the process of the law, or in doing their duty, it is murder; the same law of a (a) watchman, who is killed in the execution of his office.

WALKER was indicted and outlawed of murder, and the indictment was, that he struck the deceased in (b) *sinistra parte ventris circa umbilicum*, and it was resolved *per totam curiam*, that the indictment was certain enough, for in *sinistra parte ventris*, was of itself certain and sufficient, and these words *circa umbilicum*, which were uncertain, were abundant and superfluous: but Yong's case before, was affirmed to be good law, for there was no certainty before the (c) *circiter*: but the outlawry was reversed for other errors, and Walker was put to plead to the indictment.

INQUISITIO indentata cap^t apud Basingstoke in com^o præd^o 21 die Decembr^o, &c. coram Johan^e Scullard, gen^o uno coronator^e dict^e Dom^o Regine, in com^o præd^o super visum corporis Edwardi Savage, gen^o tunc & ibidem mortui jacen^t, per sacramentum Jacobi Serle, &c. Ad inquirend^o qualiter & quomodo præd^o Edw^o Savage ad mortem suam devenit, qui dic^t super sacram^o suum quod Jacobus Heyden, de S. in com^o præd^o yeoman, T. M. W. M. and several others, quarto die Augusti, anno 27, apud B. præd^o in com^o præd^o circa (d) horam decimam ante meridiem ejusdem diei, ex malitiis suis præcogitatis felonice ut felones dictæ Domine Regine in dict^e Edw^o Savage adtunc & ibidem insultum & affraiam fecerunt, & quod præd^o Jacobus Heyden cum quodam gladio, Anglice, a sword, valor^e quinque solidor^e quem idem Jacobus in manu sua dextra tenebat, adtunc & ibidem præfat^o Edwardum Savage felonice percussit, & dedit eidem Edwardo adtunc & ibidem unam plagam mortalem super sinistrum genu ipsius Edwardi totaliter abscindens quoddam os præd^o genu ipsius Edwardi, Anglice vocat^o, the pan of the knee, de qua quidem plaga mortali idem Edw^o Savage languebat a præd^o quarto die Augusti, anno 27, usque ad decimum nonum diem mensis Decembris anno 28, quo quidem decimo nono die Decembr^o idem Edw^o Savage ex mortali plaga præd^o apud B. præd^o in com^o præd^o obiit, et sic juratores præd^o dic^t super sacram^o suum quod prædictus Jacobus Heyden modo & forma prædictis prædictum Edwardum Savage felonice & ex malitia sua præcogitata interfecit & murtheravit, contra pacem dictæ Domine

T 2

Regine

Foster. 132, 135, 270, 308, 312, 318, 321.

(a) 9 Co. 66. a. 68. b. 3 Inst. 52. Cr. Jac. 280. Hales pl. Cor. 45.

4. Tr. 41. El. in B. R. Walker's case.

(b) Cro. Jac. 95. 5 Co. 121. b.

(c) Antea 40. b. 1 Bulstr. 80. 2 Bulstr. 328. 1 Rol. Rep. 237. 2 Inst. 318.

5. Southampton. Tr. 18. El. in B. R. Heydon's case. Coroner's Inquest.

(d) 1 Bulstr. 83.

Cases of Appeals and Indictments. Part IV.

Reginæ coronam & dignitatem suam: et ulterius præd' juratores super sacramentum suum præd' dicunt quod præd' T. M. W. M. &c. tempore felonice & muredred' præd' in forma præd' fact' scilicet dicto quarto die Augusti apud B. præd' in com' præd' anno 27 supradicto, circa horam decimam ante meridiem ejusdem diei felonice fuer' præsentés cum gladiis, &c. tunc & ibidem auxiliantes, assistentes, abettantes, confortantes & manutinentes præd' Jacobum Heyden ad feloniam & murdrum præd' faciend' & perpetrand' contra pacem dictæ Dominæ Reginæ coronam & dignitatem suam. And many exceptions were taken against this indictment: 1. Because the indictment was taken before

(a) 2 Rolls 803.

(b) Godb. 64, 66. Plowd. 75. a.

(c) F.N.B. 163. b.

(d) 5 Co. 121. a. Antea 5. b. 3 Bulst. 65. (e) Godb. 65.

(f) Godb. 65, 66. Dy. 68, 69. pl 28. Stanf. Cor. 130. a. 2 Bulst. 93. (g) Lit. Rep. 68.

J. S. coronatore (a) in com' præd', and did not say, coronatore comitatús præd', nor (b) de com' præd', and every coroner of a county is a coroner in every county of England, but not of every county; *sed non allocatur*; for the court said, that coroner in the county, &c. shall be in all reasonable intendment taken to be coroner of the county, and that is proved by the writ de (c) coronatore eligendo, the beginning of which is, *Rex vicecom'*, &c. quia L. nuper unus coronatorum nostrorum in com' tuo diem clausit extremum, &c. And so it is taken in the Lord Willoughby's case in Plowden's Commentaries, fol. 75, & 76. And precedents almost innumerable were shewn in the same manner as this is; and it was said, *quod nimia (d) subtilitas in jure reprobatur*. 2. Exception was taken, because it was not said that the said Edward Savage who was killed, was in (e) pace Dei & Dominæ Reginæ, (as the usual form, and the precedents are) *sed non allocatur*, for those are words but of amplification of the heinousness of the act, and not of substance, and perhaps he was not in peace, but fighting and breaking the peace; and many precedents were likewise shewn in which those words were omitted. 3. Because it was said, & dedit eidem Edw' adtunc & ibidem, &c. and did not say, felonice, nor ex (f) malicia sua præcogitata dedit, &c. and this exception was disallowed by the court, for this conjunction (&) couples the sentences together, so that these words (g) (felonice et ex malicia sua præcogitata) first mentioned, refer to all the verbs sublequent, or otherwise too much repetition and tautology would be made of the said words, and many precedents were likewise shewn to such effect, and in the same form as this is, as to this point; and these words *adtunc & ibid'* make this point clear, for *adtunc & ibid'* make all to be done at one and the same instant. The 4th except. was because

because the depth (a) and breadth of the wound was not shewn, as is always usual in indictments, so that it may appear to the court that the wound was mortal: but it was answered and resolved by the court, that it could not be in this case, because all the pan of the knee was (b) entirely cut off; as if an arm or (c) leg is cut off, or if a man is beheaded, the depth or breadth of the wound shall not be shewn. The 5th exception was, because it was said *tempore felonie & (d) murdered præd'* whereas it should be *murdrum*, and this exception was also disallowed, for *tempore felonie præd'* had been sufficient without saying *murdered*, and therefore the addition of *that* shall not make the indictment insufficient, forasmuch as *murderum* is a word insensible and vain, so that no contrariety or repugnancy appears, for (e) surplusage will not hurt but when it is repugnant or contrary to the matter precedent or subsequent. The 6th exception was, because the wound was given the 4th day of August, and the death was the 19th day of December next ensuing, and the indictment says that *præd' T. M. W. M. &c. tempore felonie & murdered præd' fact', scilicet 4 Augusti, &c. felonice fuerunt præsentis, &c. ad feloniam & murderum præd' in forma præd' faciend'*: to which it was said by Gawdy the Queen's Serjeant, and Popham the Queen's Attorney, that the death has relation to the stroke, for if a man *non compos* (g) *mentis*, strikes himself, and afterwards becomes *compos mentis*, and dies, the death shall have relation to the stroke, and he shall forfeit nothing, as it is agreed in 22 E. 3. Corone 244. So (h) Stamford says, that the appeal shall be brought within the year after the stroke, and not the death, for when the death ensues, now in judgment of the law the felony was committed the day when the wound was given, for the death is but *quodammodo* the execution of the felony; but *tota curia in Banco Regis* against that; and they said they had often adjudged indictments insufficient, when the stroke is one day, and the death another, and the jury concluded the murder or homicide to be committed the first day; but they said that in the case at bar the indictment should be, that the said *præsentis & abettantes fuerunt præsentis, auxiliantes, &c. ad feloniam & murderum præd' in forma præd' faciend'*. Another reason to maintain the indictment was urged, because the indictment, notwithstanding *that*, was sufficient enough, for the office of the jury is to find *veritatem facti*: (i) and the office of the Judges is to declare *veritatem juris*; and because they have found the whole circumstance and truth of the fact, that without question the law makes them prin-

(a) Godb. 65, 66.
2 Inst. 318.
Stamf. Cor. 79.
a. 5 Co. 121. b.
122. a.

(b) 2 Inst. 318.
5 Co. 122. a.
(c) 5 Co. 122. a.

(d) God. 65, 66.
5 Co. 121. b.

(e) 5 Co. 121.
b.

(f) Plowd. Com.
401.

(g) 3 Inst. 54.
1 Co. 99. b.
Plowd. 260. a.
Mo. 140. Stamf.
Cor. 19. b. 20. a.
(h) 2 Inst. 320.
Stamf. Cor. 63. a.
Dyer 50. pl. 9.
10. 2 Inst. 318,
320. 3 Inst. 53.
Cr. El. 196, 739.
3 Salic. 37.

(i) 11 Co. 10. b.
2 Bulst. 204, 251,
305, 314.
1 Sid. 127.
8 Co. 155. a.
9 Co. 13. a. 25.
a. Co. Lit. 125.
a. 155. b. 226. a.
Plowd. 114. b.

cipals, therefore although they take upon themselves also the office of Judges, *sc.* to decide when and at what time the felony was committed, it shall not make *that* vicious which they have found sufficiently and certainly; for in all cases, when a (a) jury find the matter committed to their charge at large, and further conclude against law, the verdict is good, and the conclusion ill: moreover it was moved in maintenance of the indictment, that the indictment against them was good, in regard it appears by the indictment, that they all of their malice prepenſe, feloniously, and as felons made their assault, and then, although Heyden (b) only gave the wound, yet it appears by the connection of all the parts of the indictment, by the conjunction, and by the adverbs *adtunc* & *ibidem*, that they were present, &c. And thereupon Wray, Chief Justice, Sir Thomas Gawdy, Shute and Clench, would be advised; and afterwards, upon conference had with the other Justices, the said indictment, as to the said 6th exception, was held repugnant and insufficient as to the said T. M. W. M. &c. for no felony was committed till the death, and none shall be adjudged a felon by relation, which is but (c) a fiction of the law: and Wray, Chief Justice, said, the common experience of the King's Bench was, and so was the law without question, that the year to bring the appeal should be accounted from (d) the death and not from the stroke, against the opinion of (e) Stamford: but it was resolved, that to conclude that he committed the murder the last day was sufficient, but the better form is to conclude, that he committed the murder (f) *modo* & *forma suprad.* 2. That the said clause of present, aiding, &c. was necessary, and without it the indictment was insufficient, for it shall not be maintained by argument or implication, nor supplied by intendment; and so as to this 2d and last point it was resolved in Milbourn's case, *Pasch.* 1 *fac. Regis*, in the King's Bench; and because the indictment wanted the said clause, he and divers others were discharged.

6.
Ogle's case.
(g) Cr. El. 196.
Mich. 32 & 33 El.

(b) 2 Inst. 318.
320. 3 Inst. 53.
Dy. 50. pl. 9, 10.
Cr. El. 196, 739.
(i) 7 Co. 2. a.

CATHARINE (g) Hume brought an appeal of murder against Luke Ogle of the death of A. H. her husband, and declared, that the defendant, 27 *Septembris*, gave the mortal wound at Weetwood *in com' Northumb'*, and that the husband the same day of the wound aforesaid, *apud Westlibborn in eodem com' obiit*, & *sic præd' Lucas Ogle apud Weetwood præd' modo* & *forma præd'*, the said A. H. felonice, &c. *murdravit*; and it was resolved that the declaration was repugnant and insufficient, for as it (b) cannot be said, that he murdered him the first day, as it was adjudged before in Heyden's case, so it cannot be said that he murdered him at the (i) place where he was struck, but where he died,

HUDSON

HUDSON brought an appeal of maihem against Lee, and declared that the defendant the 8th day of Jan. 28 Eliz. feloniously maihemed him in his left hand, &c. The defendant pleaded, that heretofore, and before the appeal commenced, the plaintiff brought an action of trespass in the Common Pleas of assault, battery and wounding, against the defendant, the same 8th day of January, anno 28 aforesaid, to which the defendant pleaded not guilty, and was found guilty, and damages assessed to 200 marks for the assault, battery and wounding, and 10s. costs, and judgment thereupon given, and satisfaction acknowledged before the appeal brought, and averred, that the battery and wounding in the said action of trespass, and the said maihem, whereof the appeal is now brought, was all one and not several: and it was moved, that it was no bar for two reasons. 1. Because the appeal of maihem is of an higher nature than the action of trespass, for in the appeal the plaintiff declares that the defendant, *felonice* maihemed him, *vide* 40 Aff. 2. where the plaintiff declares, that the defendant *felonice* (a) *ut felo Dom' Regis* maihemed him, and the rule of the law is, that a recovery or bar in any action, is a good bar in another action of an equal or inferior nature, but not in an action of a (b) superior nature, as a recovery or bar (c) in assise is a good bar in another assise, 44 E. 3. 45. 9 H. 7. 23, &c. but not in mortdauncester, 5 Aff. 1. nor is a recovery or bar in mortdauncester, a bar in a writ of right, (e) F. N. B. 5. 30 Aff. 5. 11 E. 3. *Entre* 56, &c. And a bar in an action of trespass of (f) goods taken away, is no bar in appeal of robbery, for the appeal of robbery is higher, as it is held in 2 R. 3. 14. And this was moved, admitting the appeal was brought for the same thing for which the action of trespass was brought: but it was further moved, that the appeal is brought for the maihem only, and therefore it is said *felonice*, which cannot be applied to trespass, and the action of trespass for the battery and wounding, which does not touch the maihem; and therefore it is agreed in 22 Aff. 82. that after the plaintiff in the appeal has recovered for the maihem, (g) he may have an action of trespass for the battery, whereby it appears, that the appeal concerns the maihem only: but it was resolved *per tot' curiam*, that the (h) bar was good, for in all cases when the plaintiff for a wrong or injury is only to recover damages, he shall not be twice satisfied for one and the same thing, *juxta illud*; (i) *nemo debet bis puniri pro uno delicto*, & (k) *Deus non agit bis in ipsum*; but in both these actions, *sc.* of appeal and trespass, the plaintiff shall only recover damages; (l) and it appears to

T 4

7.
 Hil. 31. El. in
 B. R. Hudson v.
 Lee. 1 Leon. 51.
 318, 319.
 Moor 268.
 Gouldf. 33.
 Styl. 347.
 Skinner 49.
 3 Salk. 5.
 (a) Br. Ap. 72.
 (b) 6 Co. 7. b.
 5 Co. 33. a.
 (c) Doct. pl. 67.
 (d) Doct. pl. 67.
 (e) F. N. B. 5. n.
 (f) Doct. pl. 67.
 (g) 1 Leon 319.
 Br. Appeal 60.
 Br. Trespass 241.
 (h) Doct. pl. 67.
 1 Leon 19, 319.
 Moor 268.
 2 Rolles 112.
 (i) 8 Co. 118. b.
 2 Ventr. 170.
 5 Co. 61. a.
 11 Co. 59. b.
 Cr. Jac. 481.
 Cawley 78.
 Noy 82.
 1 Roll. Rep. 95.
 Bridgm. 122.
 Wing. Max. 695.
 (k) 8 Co. 118. b.
 (l) Co. Lit. sect.
 194. 502.
 Co. Lit. 126. b.
 288. a.
 18 Ed. 3. a. pl.
 31. 28 Ed. 3.
 24. pl. 2.

the

(a) Hutt. Arg.
57. 3 Salk. 5.

(2.)

(b) Moor 268.
1 Leon. 319.

8.

Tr. 32 El. in
B. R. Syer's
case.

(c) Hales pl. Cor.
221. 222.

Jenk. Cent. 29.

Dalt. Just. 401.

18 Ed. 4. 9. b.

Fitz. Inst. 32. b.

33. a.

1 Rolles 777.

Ver. Nat. Br.

117. b.

7 H. 7. 12. b.

Fitz. Corone 53.

Br. Clergy 16.

3 Inst. 114, 139.

Cr. Car. 566, 567.

Plowd. 99. a. b.

9 Co. 117. a.

2 Inst. 183, 184.

Stam. Cor. 47.

b. 48. a.

11 Co. 35. a.

Cr. El. 541.

3 H. 7. 1. b.

Br. Corone 131.

Br. Clergy 15.

Fitz. Cor. 58.

9 H. 7. 19. b.

2 Rolles 3. 21. b.

Moor 461.

17 E. 4. 3. b.

Br. Cor. 137.

157, 164.

9.

Pasch. 39. Eliz.

Bibit's case.

(d) Cr. El. 540.

541. 3 Inst. 114.

the court by the defendant's bar, which the plaintiff by his (a) demurrer has confessed, that he himself in the action of trespass, which he brought for the battery and wounding, has recovered damages for the maihem, for wounding includes the maihem and more, and the defendant has averred, that the wounding in the action of trespass, and the maihem in the appeal were all one: so although the appeal of maihem is an higher action, yet soasmuch as he shall therein only recover damages, and damages he has recovered in the action of trespass, it was therefore resolved, that the bar in the case at bar was good: and Wray, Chief Justice, said, that so it was (b) now lately adjudged in this very court, which record he had seen, and it agreed with the book in 41 Aff. 16. and the book 2 R. 14. is good law, for in the appeal of robbery, the plaintiff shall have judgment against the defendant for his life, and not for any damages.

IT was resolved *per tot' curiam*, that if principal and accessory are, and the principal (c) is pardoned, or has his clergy, the accessory cannot be arraigned; for the maxim of the law is, *ubi factum nullum, ubi fortia nulla; & ubi non est principalis, non potest esse accessorius*: then before it appears that there is a principal, one cannot be charged as accessory, but none can be called principal, before he is so proved and adjudged by the law, and that ought to be by judgment upon verdict or confession, or by outlawry, for it is not sufficient that *in rei veritate* there was a principal, unless it so appears by judgment of the law, and that is the reason that when the principal is pardoned, or takes his clergy before judgment, that the accessory shall never be arraigned, for it does not appear by judgment of the law that he was principal, and the acceptance of the pardon, or praying of the clergy is an argument, but no judgment in law that he is guilty: but if the principal after attainder, is pardoned, or has his clergy allowed, there the accessory shall be arraigned, because it appears judicially that he was principal.

JOHN GOFF, (d) brother and heir of R. Goff, brought an appeal of murder of the said R. G. against Bibithe as principal, and against Hoell David as accessory before, and against David ap Thomas as accessory after; the principal pleaded not guilty, and by *Nisi Prius* in the county of Monmouth, he was found guilty of manslaughter, and not guilty of murder, and had his clergy: and upon this matter, first it was resolved, by Popham, C. J. & *per tot' cur'*, in B. R. that Hoell David was

was discharged, because he could not be accessary before the fact in case of (a) manslaughter, for manslaughter ought to ensue upon a sudden debate or affray, for if it is premeditated it is (b) murder. 2. It was resolved, that although the principal (c) was convicted by verdict, yet forasmuch as he had his clergy before judgment, so that it does not appear judicially, *sc.* by judgment of the law that he was a principal, therefore, and for the causes alledged in Syer's case, it was awarded, that both the accessories, as well before as after, should be discharged. The same law, if the principal upon arraignment confesses the felony, and before judgment obtains a pardon, or has his clergy allowed, the accessory thereby is discharged, *vide* 2 E. 3. 27. 22 E. 3. Corone 264. 7 H. 4. 16. 10 H. 4. 5. 3 H. 7. 1. b. & 3 H. 7. Corone 53. And upon divers disagreeing opinions, you will understand the law, as here it was adjudged upon consideration of all the books.

(a) Moor 461.
Hales pl. Cor.
217.
(b) Co. Lit. 287.
b.
3 Inst. 55. b.
(c) 3 Inst. 114.
139.
11 Co. 35. a.
Cr. El. 541.
Antea 43. b.

See contra: 13.
Ed. 4. 3. b.

WILLIAM VAUX at the sessions of peace for the county of Northumberland, held 27 Julii, anno 32 Eliz. before the Justices of peace of the same county, was indicted of voluntary poisoning of Nicholas Ridley, which indictment was removed into the King's Bench: and in discharge thereof the said Vaux pleaded, that at another time, *scil.* 12 Augusti, anno 30 Eliz. at Newcastle upon Tyne in the county of Northumberland, before the Justices of assise of the same county the said Vaux was indicted: *quod cum Nich' Ridley nuper de W. in com' præd' Armig' jam defunctus, per multos annos, ante obitum suum nuptus fuisset cuidam Margaretæ uxori ejus & nullum exitum habuit, præd' Will' Vaux nuper de K. in com' C. generos. subdole, cautè, & diabolicè intendens mortem, venenationem, & destructionem ipsius Nicholai, & Deum præ oculis non habens, 20 Decembris, anno 28 Eliz. apud W. prædict' felonice, (a) voluntariè, & ex malitia sua præcogitata, persuadebat eundem Nichol' recipere & bibere quendam potum mixtum cum quodam (b) veneno vocat' (c) cantharides, affirmans & verificans eidem Nich' quod' præd' potus sic mixtus cum præd' veneno vocat' canth' non fuit intoxicatus (Anglica poisoned) sed quod per receptionem inde præd' Nich' exit' de corpore dictæ Margaretæ tunc uxoris suæ procuraret, & haberet ratione cujus quidem persuasionis & instigationis præd' Nich' postea, *scil.* 16 Januarii anno supradicti apud T. in com' N. præd' nesciens prædictum potum cum veneno in forma prædict' fore mixt', (d) sed fidem adhibens prædict' persuasioni dicti Willielmi recepit & bibit, per quod prædictus Nicholaus immediate post receptionem veneni prædicti per tres horas im-*

10.
Pasch' 33 El.
Vaux's Case in
B R.
Fitzgib. 263.

(a) Cr. Jac. 438.
(b) 3 Inst. 48.
(c) Palm. 547.
548.

(d) 1 Ventr. 24.

mediate

(a) Cr. Jac. 43⁸.

(b) 5 Co. 123 a.

mediate sequent' linguebat, & postea præd' 16 Jan. anno supra-
dict' ex venenatione & intoxicat' præd' apud T. præd' (a) obiit :
et sic præd' Will' Vaux felonice & ex malitia sua præcogitata præ-
fat' Nich' voluntarie & felonice modo et forma præd' intoxicavit,
interfecit, (b) & murdravit, contra pacem, &c. Upon which
indictment the said Vaux was arraigned before the same Jus-
tices, and pleaded not guilty : and the jurors gave a special
verdict, and found, *quod præd' Nich' Ridley venenatus fuit,*
Anglicè poisoned, per receptionem præd' cantharides, & quod præd'
Will' Vaux non fuit præsens tempore quo præd' Nich' Ridley recepit
præd' canth' sed utrum, &c. And thereupon judgment was
given by the said Justices of assize in this manner; *super quo*
visis, & per cur' hic intellectis omnibus & singulis præmissis, pro
eo quod videtur cur' hic super tota materia per veredictum præd' in
forma præd' compert', quod præd' venenatio per reception' canth' &
præd' procuratio præd' Will' ad procurand' præd' Nich' ad ac-
cipiend' præd' canth' modo & forma prout per verdict' præd' com-
pert' fuit, non fuit felonia & murdrum voluntar' : ideo considerat'
est quod præd' Will' Vaux, de felonia & murdro præd' in indicta-
mento præd' superius specificat', necnon de dicta felonica venena-
tione præd' Nich' Ridley in eodem indictamento nominati eidem
Will' imposuit eat sine die : and as to the felony and murder he
pleaded not guilty.

And first, it was resolved *per totam curam*, that the said in-
dictment upon which Vaux was so arraigned was insufficient,
and principally because it is not expressly alledged in the indict-
ment, that the said Ridley received and drank the said poison,
for the indictment is, *præd' Nich' nesciens præd' potum cum*
veneno fore intoxicatum, sed fidem adhibens dict' persuasioni dicti
W. recepit & bibit, per quod, &c. So that it doth not appear
what thing he drank, for these words (*venenum præd'*) are
wanting, and the subsequent words, *scilicet per quod prædict'*
N. immediate post receptionem veneni prædict', &c. which
words imply receipt of poison, are not sufficient to main-
tain the indictment, for the matter of the indictment
ought to be full, express, and certain, and shall not be
maintained by argument, or (c) implication, because the in-
dictment is found by the oath of laymen. 2. It was agreed
per curiam, that Vaux was a principal (d) murderer, although
he was not present at the time of the receipt of the
poison, for otherwise he would be guilty of such horrible
offence, and yet should be unpunished, which would be in-
convenient and mischievous ; for every felon is either principal
or accessory, and if there is no principal there can be no ac-
cessory, *quia (e) accessorium sequitur principale*, and if any had
procured Vaux to do it, he had been accessory before ; *quod*
nota

(c) Stamf. Cor.
90. a. b.

(d) 2 Inst. 183
3 Inst. 48, 138.
9 Co. 81. b.
Jenk. Cent. 290.

(e) Co. Lit. 152. a.
1st alm. 434.
1atch. 27.

nota a special case, where the principal an accessory also shall both be absent at the time of the felony committed. 3. It was resolved by the Lord Wray, Sir Thomas Gawdy, Clench and Fenner, Justices, that the reason of *auterfoits acquit* was, because where the maxim of common law is, that the life of a man shall not be twice (a) put in jeopardy for one and the same offence, and that is the reason and cause that *auterfoits* acquitted or convicted of the same offence is a good plea, yet it is intendable of a (b) lawful acquittal or conviction, for if the conviction or acquittal is not lawful, his life was never in jeopardy; and because the indictment in this case was insufficient, for this reason he was not *legitimo modo acquietatus*, and that is well proved, because upon such* acquittal he shall not have an action of (c) conspiracy, as it is agreed in 9 E. 4. 12. a. b. *vide* 20 E. 4. 6. And in such case in appeal, notwithstanding such insufficient indictment, the abettors shall be enquired of, as it is there also held; and although the judgment is given that he shall be acquitted of the felony, yet this acquittal shall not help him, because he was not *legitimo modo acquietatus*; and when the law saith, that *auterfoits acquitted* is a good plea, it shall be intended when he is lawfully acquitted; and that agrees with the old book in 19 E. 3. *Corone* 444. (d) where it is agreed, if the process upon indictment or appeal is not sufficient, yet if the party appears (by which all imperfections of the process are saved) and is acquitted, he shall be discharged; but if the appeal or indictment is (e) insufficient (as our case is) there it is otherwise: but if one, upon an insufficient indictment of felony has judgment, *quod suspend per coll*, and so attainted, which is the judgment and end which the law has appointed for the felony, there he cannot be again indicted and arraigned until this judgment is reversed by (f) error: but when the offender is discharged upon an insufficient indictment, there the law has not had its end, nor was the life of the party, in the judgment of the law, ever in jeopardy; and the wisdom of the law abhors that great offences should go unpunished, which was grounded without question upon these ancient maxims of law and state: *maleficia non debent remanere impunita, & impunitas continuum affectum tribuit delinquendi, & minatur innocentes qui parcit nocentibus*: so if a man be convicted either by verdict, or by confession upon an insufficient indictment, and no judgment thereupon given, he may be again indicted and arraigned, because his life was never in jeopardy, and the law wants its end: and afterwards, upon a new indictment, the said Vaux was tried and found guilty, and had his judgment, and was hanged.

CATHA-

(a) *Postea* 47. a.
Antea fol. 40. a.
1 Bulstr. 142.

(b) 3 Inst. 214.
Cr. Car. 147.
20 H. 7. 12. a.

(2.)
(c) 3 Inst. 143.
Palm. 45.
Bridgm. 132.
Br. Consp. 23.

(d) 1 Bulstr. 142.
Stamf. Cor. 106.
2.
F. N. B. 115. g.
Palm. 39.
(e) Hal. pl. Cor.
244.
Postea fol. 47. a.
Stamf. Cor. 106.
a.
Doct. pl. 36, 67.
3 Inst. 214.
Hales pl. Cor.
247.
2 Leon. 160.
(f) Hales pl.
Cor. 247.

11.
Mich. 33 & 34
Eliz. Wrote v.
Wigges.
Cro. Eliz. 296.

CATHARINE, late the wife of Robert Wrote, brought an appeal of the murder of her husband, against Thomas Wigges, and declared, that the said T. Wigges at Shepperton in the county of Middlesex, 23 September, *anno* 31 Eliz. of his malice forethought, feloniously struck, &c. whereof the said Robert Wrote died 24 September then next following, &c. and so the defendant murdered him the 24th of September aforesaid. The defendant pleaded, that he himself heretofore, 8 Octob. *anno* 31 Reg. Eliz. at Shepperton aforesaid, by an inquisition there then taken before William Danby, then coroner of the Queen's household, and Iron Chaukhill, then one of the coroners of the said county of Middlesex, upon the view of the body of the said Robert Wrote, by the oath of 12 men (and shewed their names) of the said county of Middlesex, it was presented, that the said Thomas, 23 Sept. 31 Eliz. at Shepperton aforesaid, the said Robert Wrote feloniously did strike, &c. whereof he died the 24th of Sept. following, and so indicted him of manslaughter, which inquisition afterwards the 23d Sept. 32 Eliz. at London, in the parish of St. Sepulchres, the said Iron Chaukhill, then one of the coroners of the said county of Middlesex, at the gaol-delivery at Newgate, made for the said county of Middlesex there, *viz.* at Justice-Hall in the Old-Bailey, before John Hart, then mayor of the city of London, and other Justices of gaol delivery of prisoners in the said gaol of Newgate, being delivered and certified; upon which the said Thomas Wigges, then under the custody of the Sheriffs of London, was brought to the bar; and there then the said Thomas Wigges being arraigned upon the same indictment, confessed the felony, and prayed his clergy; and the book being delivered to him he read as a clerk, as by the said record appears, and said that no judgment was given thereupon; and averred, that Shepperton at the time of the said inquisition, and stroke and death was within the verge of the Queen's household, and pleaded over to the felony, &c. And it appeared that the said arraignment and confession, and allowance of the clergy, was after the purchase of the writ of appeal * and before the return of it; upon which plea in bar the plaintiff demurred in law. And after many arguments, and great deliberation, it was adjudged against the defendant. And in this case six points were resolved, 1. that *auterfoits* (a) convict of manslaughter, and clergy thereupon allowed was a good bar in an appeal of murder, and so it was adjudged in an appeal in B. R. between T. Burge, Esq. brother and heir of H. Burge, and T. Holcroft, (b) Esq. *Pass.* 20 Eliz. of the murder of the said H. where the defendant pleaded, that at Hampton-Court, in the parish of Hampton in the county of Middlesex, within the verge, by an inquisition taken before R. Vale, then coroner of the Queen's household and one of the coroners *com' Midd' super*

* Antea 47. b.

(a) Yelv. 205.
Antea 40. a.
16 E. 4. 11. a.

(b) 3 Inst. 131.
2 Leon. 83,
160, 161.
1 Anderf. 68.
Co. Entr. 53. b.
pl. 4.

super visum corporis, the defendant was indicted of the manslaughter of the said Henry within the verge; upon which indictment the defendant was arraigned before commissioners of Oyer and Terminer in the county of Middlesex, and confessed the indictment, and prayed his clergy, and thereupon *curia advisare vult*, and demanded judgment of the appeal; and in that case two points were resolved. 1. That *that* indictment was well taken, and within the stat. of *articuli super chartas, cap. (a) 3.* by which it is enacted, that in case of the death of a man within the verge, it shall be commanded to the coroner of the county, that he with the coroner of the King's household, shall do as belongeth to his office. And although it was objected, that the statute requires two persons, *sc.* two coroners to do the office which appertains in this case; and in the case at bar there was but one person, although he had two several offices, *sc.* coroner of the household, and one of the coroners of the county, and when the law gives authority to two persons, one only cannot execute it; for *(b) securius expediuntur negotia commissa pluribus, & plus vident (c) oculi quam oculus, & una (d) persona non potest supplere vicem duarum*: yet in this case of several authorities, it was resolved that the indictment was well *(e)* taken, for the intent and meaning of the act was performed, and the mischief recited in the act avoided as well when one person is coroner of the household, and of the county also, as if there should be two several persons, for although the court removes, yet he, as coroner of the county, may proceed, &c. 2. Where it is provided by the stat. of 3 H. 7. *(f)* cap. 1. "that if it fortune that the felons, murderers, "and accessories, or any of them be acquitted upon indictment, or the principal attainted, &c. the wife or next heir to "him so slain, may have their appeal against the persons so "acquitted, or against the principals so attainted, if they be "alive, and that his benefit of his clergy thereof before be not "had;" (for at that time clergy was allowed for murder.) It was resolved that the bar was good at the common law not restrained by the said act, because if the defendant had had his clergy, then without question the appeal would not lie; for if the offender is attainted, and has his clergy, it is excepted out of the act and left to the common law; *a fortiori* when he is but convicted thereof, and prays his clergy and the act of the court (to be advised as to the allowance of clergy) shall not *(g)* prejudice the party in case of life; but it was resolved, that these words (attainted of murder) in this act, shall not be intended only of a person who has judgment of life, but also extend to a person convicted by confession, or verdict; for a person attainted is a person convicted and more, & *(h) omne majus continet in se minus*; and if the statute should not extend to persons convicted, all the purview of the act would be overthrown. And in the statute of 25 E. 3. cap. 2. it is said, attainted by verdict, which is as much as to say, convicted by verdict, and

many

(a) 6 Co. 12. a.
20. b. 10 Co.
69. b. 74. a.
3 Keb. 335.
2 Inst. 547, 548.
3 Inst. 134.
Cro. El. 502.
1 Bullst. 208, 209,
210, 211, 212.
2 Leon. 160.
5 E. 4. 129. a.
Br. Action sur
le Statute 38, 49.
10 H. 6. 13. a.
Registr. 185. a.
191. b.
F. N. B. 241.
Rast. Ent. 433. a.
(b) 11 Co. 3. b.
4. a.
(c) Lit. Rep. 96.
(d) Cawly 209.
(e) 3 Inst. 134.

(f) 3 Inst. 213,
131. Stamf. Cor.
106. b. 107. a.
1 Jones 145.
F. N. B. 115. h.

Foster 304.

(g) 3 Inst. 131.

(h) 2 Co. 68. a.
5 Co. 115. a.
6 Co. 43. b.
3 Inst. 109.
Co. Lit. 52. b.
285. a.
1 Bullst. 105.
2 Bullst. 48.

Cases of Appeals and Indictments. Part IV.

(a) 3 Keb. 20.
Cart. 120.
Heti. 101.
2 Roll. Rep.
239.

(b) 6 Co. 65. a.
10 Co. 126. a.
Co. Lit. 283. b.
304. b.
Noy. 30.

(c) Cro. El. 276,
296, 464, 465.
Antea 40. a.
Larch. 126.
O. Bendl. 144.
2 Roll. Rep. 461.
Moor 407.
Britton lib.

(d) 2 Inst. 549.

many times in common speech a person convicted is called a person attainted; & (a) *loquendum est ut vulgus*; also it would be hard that the law should enable the party to appeal against a person acquitted, who by judgment of the law is innocent, and should not enable him against one who is convicted who is found guilty: and in that case it was said that it was adjudged in the case of one Agnes Gainsford, that where the said act of 3 H. 7. cap. 1. is, "that the wife, or heir of him so slain, shall have the appeal;" that the heir of a woman who was murdered shall have appeal against one who was acquitted of the same murder for (b) *apices juris non sunt jura*: and it was resolved without difficulty in Holcroft's case, that if a man commits murder, and is indicted and convicted or acquitted of manslaughter, he shall never answer to any indictment of the same death, for all is one and the same felony for one and the same death, although murder is in respect of the circumstance of the forethought malice more odious; and therefore in an indictment, or appeal of murder, he may be found guilty (c) of manslaughter. 2. It was resolved in the case at bar, that at com. law the coroner of the K's house has an exempt jurisdiction within the verge; and that the coroner of the county cannot intermeddle therein; and that well appears by the preamble of the said stat. of *articuli super chartas*; "and so farasmuch as heretofore many felonies committed within the verge have been unpunished (and the reason and cause thereof was) because the coroners of the county have not been authorised to enquire of such manner of felonies done within the verge, but the coroner of the King's house which never continueth in one place, by reason whereof there can be no trial made in due manner, nor the felons put in exigent, nor outlawed, nor any thing presented in the circuit, the which hath been to the great damage of the King, and nothing to the good preservation of his peace:" by which it appears, that at common law the coroner of the county could not intermeddle with the death of a man within the verge, but the coroner of the household only, and so was it adjudged, *Paschæ* 24 Eliz. in B. R. where Swift was indicted before the coroner of the county of Middlesex, of a murder committed at Tuthil in the *com' Midd'*, which indictment was removed into B. R. and there Swift pleaded, that Tuthil was at the time of the murder, and yet is within the verge, &c. upon which the Queen's Attorney demurred in law, and it depended in advisement 3 terms, and at length the plea was adjudged good, and thereupon he was discharged of the indictment, for as the coroner of the household cannot intermeddle within the county out of the verge, because his office extends not to it, so the coroner of the county cannot intermeddle within the verge; for that was exempted out of his office by the common law, and it would be against reason that their offices and jurisdictions being several that the one should intermeddle within the jurisdiction of the other. But it was resolved, that the Justices (d) B. R. Justices of Oyer and Terminer,

Terminer, gaol-delivery, (a) and Justices of Peace, may enquire of, hear and determine all murders and felonies within the verge, because their authority and jurisdiction are general through the whole county, and so always it has been used, and so it was adjudged without scruple in Holcroft's case. 3. It was resolved, that the indictment was insufficient, for by the said indictment taken before the coroner of the household, and the coroner of the county, it appears that the stroke and the death were at Shepperton in *com' Midd'* and it doth not appear in the indictment that Shepperton was within the verge, *scil.* (b) within 12 miles of the lodging of the King in his court; and although in truth it was within the verge, yet the indictment being (c) *veredictum*, i. e. *dictum veritatis*, and matter of record, ought to import all the truth which is requisite by law, for *de (d) non apparentibus & non existentibus eadem ratio*, and every part of the indictment material ought to be found by the oath of the indictors, and cannot be (e) supplied by bare saying or averment of the party; and because it doth not appear within the indictment that Shepperton was within the verge, for this cause, the indictment taken before the coroner of the household, and the coroner of the county is insufficient; for it doth not appear that the coroner of the household had any authority to take it, and it shall not be as void and *coram non judice* as to the coroner of the household, and good before the coroner of this county, for the record is entire, and the indictment taken before both entirely, and perhaps the jury was directed principally by the coroner of the household, and the witnesses examined and sworn by him although all is recorded and enrolled in both their names: also the defendant has availed in his plea, that Shepperton was within the verge, so that the coroner of the county, as appears by the confession of the defendant himself, could not take it solely. 4. It was resolved, that soasmuch as the indictment upon which he was convicted was (f) insufficient, notwithstanding such conviction, he may be indicted and arraigned again, or appealed of the same offence, because his life in judgment of the law was never in jeopardy, as it was resolved in Vaux's case before, *Pasch.* 33 Eliz. 5. It was resolved *per totam cur'*, that where the stroke was given the 23d day of September, and the death followed the 24th day; and concludes that the said T. Wiggles murdered the said Robert Wrote the (g) 24th day, that it was good enough, for it was not murder before; but to conclude that he murdered him the 23d day, was repugnant, as it was resolved before in Heyden's case, *Trin.* 28 Eliz. But it was resolved, that the finding of the stroke and the death was not sufficient by itself without making conclusion, that is to say, and so the said Tho. Wiggles murdered the said Rob. Wrote, &c. 6. It was resolved, that though the conviction was (h) pending the appeal, yet,

(a) 2 Inst. 549.

(b) 10 Co. 72. b.

74. a. F. N. B.

241. b. 13 R. 2.

c. 3. 27 H. 8.

c. 5 & 33 H. 8.

c. 12.

(c) Co. Lit. 226. a.

(d) 5 Co. 5. b.

Cawdry's Case.

Vaugh. 72.

12 Co. 52.

2 Inst. 20.

Palm. 15.

3 Bulstr. 110.

Hob 205.

(e) 5 Co. 120. b.

22 E. 4. 12.

(f) Hales pl.

Cor. 244, 247,

Stamf. Cor.

106. a. Doct. pl.

36, 37.

3 Inst. 214.

Antea 45. a.

(g) Antea 42. b.

2 Inst. 318, 320.

3 Inst. 53.

Cro. El. 196,

739.

Dyer 50. pl. 9,

10. Stamf. 63. a.

(h) 1 Jones 145.

(a) Antea 45. b.
1 Jones 145.

yet, if it had been (a) lawful, and before the defendant was compelled to plead, it had been a good bar. And afterwards Wiggles was tried in B. R. and upon his trial, the Queen's Attorney was of counsel with him (because it was a subject's suit) and Wiggles was found not-guilty of the murder.

12.
Hil. 45 Eliz. in
B. R. Wait's
Case.
(b) Jenk. Cent.
29. 2 Inst. 183.

THE wife of William (b) Waits, Gent. brought an appeal of murder of her husband against divers; and afterwards she brought another appeal against others; and in all she had brought seven several appeals of the said murder against several persons as principals: and it was resolved by Popham, C. J. & totam curiam, that all the said appeals but the first ought to abate; for without any difficulty, all principals and accessories before the murder, and also all accessories after, and before the writ purchased, against whom the plaintiff would bring appeal, ought to be named in one writ and not

(c) Jenk. Cent.
29. pl. 56. 9 H. 4.
1. b. 2. a.
Fitz. Coron. 77.
Br. Appeal. 28.
Kelw. 83. pl. 4.
Stamf. Cor. 65. b.

in divers. (c) 9 H. 4. 1. The wife of Thomas Goter brought an appeal of death against Thomas Walton, and two others, Walton only appeared, and the others made default. The plaintiff declared against all three, that is to say, two as principals, and against the other as accessory: Walton pleaded, that at another time the said woman made an appeal of the same death before certain Justices of gaol delivery in the county of N. against one man as principal of the same death, who at her suit before the said Justices was attainted and hanged, and demanded judgment of the writ, and pleaded over to the felony: and it was said by the plaintiff's counsel, that her writ ought not to abate, because in her appeal before the said Justices of gaol-delivery, she could not charge any, nor could the Justices of gaol-delivery make deliverance of any who then was not in prison in the gaol before them, and that Walton and the others, now defendants, then were at liberty, and therefore it was impossible to join them in the said appeal before the said Justices of gaol-delivery, and so no default in the plaintiff. But it was adjudged, that the writ should abate; and in the same case three points were resolved. 1. That the plaintiff ought to have made her appeal against all, and afterwards to have removed it by writ before us in this place. 2. That the wife should not have (d) two appeals of death in this place, but ought to join all (whom she will charge) in one and the same writ. For if one brings an appeal of death against divers, and all but one made default, yet the plaintiff ought to declare against all; and by the same reason that he shall be driven to (e) declare against all, he ought to bring his appeal against all. 3. That in that case the defendant should not have (f) damages by the statute of W. 2. cap. 12. *quia extra casum statuti*, because the writ abated. *Vide* 28 E. 3. 90. a. (g) A woman brought an appeal of the death of her husband against the principal doer, and the principal assistants

(d) 47 E. 3. 16. b.
Br. Appeal 14.
Fitz. Cor. 104.
Dyer 39. pl. 58.
Jenk. Cent. 29.
2 Inst. 183.
7 Co. 2. b.
Bulwer's Case.
Kelw. 83. pl. 4.
Hales pl. Cor.
188. Stamf. Cor.
65. b.
(e) Hales pl. Cor.
188.
(f) Stamf. Cor.
65. b.
Fitz. Cor. 138.
(g) Stamf. Cor.
109. a.

assistants and doers, and sued another appeal against the receivers, and the book saith, that the two appeals were maintainable, notwithstanding that the statute gives that all shall be in one writ, which are the words of the book, in which the statute intended is the statute of *Magna Charta*, cap. 34. by which it is enacted, that (a) *nullus capiatur propter appellum feminae de morte alterius quam viri sui*: and because the statute saith *appellum* in the singular number, it was collected that all ought to be named in one writ; which book, if it can be maintained for law, ought to be intended of accessories after the first appeal brought, which could not be named in the first appeal. *Vide* 26 (b) Aff. pl. 52. to the same effect.

(a) 2 Inst. 68.
Stamf. Cor. 53. b.

(b) Jenk. Cent.
29. Stamf. Cor.
65. b.
Fitz. Cor. 196.
Br. Appeal 65.

Inquisitio capt' ad session' pacis, in com' Surr', tent' die Martis & die Mercurii, &c. and recites the statute of (c) 8 H. 6. of Forcible Entry, and misrecites it in some points; and this indictment was quashed for two reasons: 1. although the sessions might last two or three days, yet the record ought to mention, that the sessions were held at one certain (d) day: 2. also because the statute of 8 H. 6. was misrecited in a material point: know reader, it is not policy in such indictments to (e) recite the said act of 8 H. 6. for the recital thereof is not necessary, and misrecital thereof is fatal to the indictment, and therefore the sure way is to draw the indictment with conclusion, (f) *contra formam statuti*, &c. and with no recital of the act.

13.
Hil. 30 Eliz.
Stat. 8 H. 6.
(c) 8 H. 6. c. 9.

(d) Palm. 44.

(e) Cr. El. 96,
307, 697.
Note.

(f) Aleyn 50.

ANDREW OGNEl's Case.

Hil. 29 Eliz.

In the Common Pleas.

Vaughan 40.
1 And. 178.
4 Leon. 115, 116.
Carthew. 91.

(a) Cro. Car. 130.
Hob. 171.
2 Rol. Rep. 261,
296. Palm. 320.
1 Leon. 251.
4 Leon. 115.
Lit. Rep. 25.
1 And. 178.

IN a replevin between Andrew Ognel, plaintiff, and Thomas Underhill, and Henry Appleby, defendants: the case was, William Rainsford, *anno* 4 E. 6. possessed for 30 years of a farm called Crewelfield Grange, which consisted of divers parcels known by several names, *scil.* Hobbesfield, Parkfield, and divers others, made his will, and thereof appointed Hercules his son his executor, who 3 & 4 Phil. & Mar. demised all the grange, (except Hobbesfield) to one Henry Bere for 23 years; and demised Hobbes to Walter Freclتون for 23 years; and afterwards granted all the residue of his term in the whole grange, to the said Henry Bere and Freclتون; he in the reversion in fee, *anno* 13 El. *Reg.* by his deed granted a rent-charge in fee issuing out of all his lands and tene-ments, *communiter vocat'* Crewelfield Grange, *quondam in tenura Will' Rainsford, & ad tunc in tenura & (a) occupatione Henrici Bere vel assignator' suorum.* The rent is behind, the said term for 30 years expires, he in reversion makes a feoffment in fee of the said farm to another, the grantee makes his executors and dies, the feoffee makes a lease at will, the executors of the grantee distrain for the rent arrear in the life of the grantee before the expiration of the term; and judgment was given for the executors against the plaintiff. And in this case three points were resolved, *scil.* two at the common law, and one upon the statute of 32 H. 8. cap. 37.

The first point was, that at the common law there was a difference between annuity in fee and rent service, charge, or seck; for in case of annuity, although it continues, yet in some case an action of debt may be maintainable for the arrearages; as if (b) a parson or prebendary, &c. has an annuity, and the annuity is arrear, and parson or prebendary, &c. resigns, he shall have an action of debt for the arrearages;

(b) Postea 49. b.
F. N. B. 121. D.
Poph. 87.

so if the Parson or Prebendary dies, his (a) executors shall have an action of debt for the arrears incurred in the life of his testator, because the person of him who ought to pay the annuity, is chargeable in a writ of annuity: but otherwise it is in case of rent, be it rent-service, rent charge or feck, for when the rent continues of any estate of freehold, no action of debt lies for the (b) arrearages. Also at the common law great difference appears when rent in fee is extinct either by act in law, or by act of the party, and when particular estates in rents expire or determine: and therefore at the common law, if the son be lord, and the father tenant by certain rent, the rent is arrear, the tenant dies, and the tenancy descends to the son, in that case the rent is determined and extinct by act in law, and yet the executors of the lord shall not have an action of debt for the arrears incurred in the life of the testator, because the lord himself could by no possibility have an action of debt for the arrears, for the tenure was all in the realty, and the tenant could not be charged in any personal action for them. But if a woman is endowed of a rent, or if a rent is granted for life, and the tenant attorns, the rent is arrear, and afterwards the particular estate in the rent determines by death, the executors of the tenant in dower or of the grantee for life, shall have an action of debt by the common law for two reasons. 1. Because by possibility the testator himself might have an action of debt, for if he had surrendered his estate to him in reversion, he should have an action of debt for the arrearages incurred before. 2. These particular estates with the attornment of the tenant, or when the law supplies attornment, amount to a real contract in law, which realty, when the estate of freehold is determined, dissolves itself into personality: and these are the true differences as to this point proved and approved in our books; and therefore in 45 E. 3. Executors 71. where the case was, that the father granted a rent charge out of certain lands to his son in fee, the rent is arrear, the father dies, the land descends to the son, by which the rent is extinct by act in law, the son brings an action of debt against the executors of the father for the arrears incurred in the father's life, and adjudged that for them (as arrears of a rent) no action lies, but for the arrears of an annuity it was maintainable; and altho' by the descent of the land to the grantee being heir to the grantor, as well the annuity as the rent was determined and that the orig. election was annexed to an inheritance, yet inasmuch as the inherit. of both was determined by act in law, (which will do wrong to none) it was therefore adjudged, that his election should remain as to the said arrears, which election he has made by bringing the action of debt against the

(a) F. N. B.
120. Lit.
Postea 4). b.

(b) 9 Co. 38. b.
Cr. El. 895.
1 Roll. 594.

F. N. B. 122.
3 Co. 23.
3 Co. 64.

executors of his father; for the book says, that the son may choose whether he will have a writ of annuity or distress, &c. 4 E. 3. Executors 98. A man makes a lease for life (a) rendering rent, the rent is arrear, the lessor dies, the executors during the life of the tenant for life shall not have an action of debt, but after the estate for life determined the action shall be maintainable, 9 H. 6. 43. 14 H. 6. 26. 19 H. 6. 43. 32 E. 3. Dette 9. F. N. B. 121. C. accord: so if rent is granted for life, or a woman is endowed of a rent, the executors of the grantee, or of the tenant in dower shall have an action of debt by the common law, as appears by 32 E. 3. Dette 9. 34 H. 6. 20. * 9 H. 7. 17. But in the case of 11 (b) H. 4. fol. *ultimo*, when rent is granted for life, and afterwards becomes arrear, and afterwards the tenant aliens, and afterwards the grantee of the rent dies, the action shall be maintainable against him who was tenant, and took the profits when it was arrear. (c) 26 E. 3. 64. a. b. Sir Will. Loringe's case. Sir William Loringe was grantee for life of a rent out of the moiety of a manor, of which moiety a man was seised in the right of his wife, the rent was arrear; Sir William Loringe died, his executors brought an action of debt against the husband only for the arrearages of the rent. and there two points are adjudged: one, that by the death of Sir William Loringe, the grant for life was turned into nature of debt. 2. That forasmuch as the husband took the profits of the land charged with the rent when it was arrear, that he only (without his wife) shall be charged in an action of debt: and there it is held, that after the death of the husband the action of debt in such case shall lie against his executors. if there is lessee for life of a manor, and the rents are arrear, the tenant for life surrenders his estate, he shall have an action of debt for the arrearages: so if a Parson or a Prebendary, &c. who has an annuity (d) resigns, he shall have an action of debt for the arrearages incurred before the resignation, 19 H. 6. 41. b. 43. F. N. B. 121. D. E. So if a Prebendary or Parson, &c. (e) dies, his executor shall have an action of debt for the arrearages incurred during his life. *Vide* 4 H. 6. 31. 7 H. 6. 19. 8 H. 6. 7. 19 E. 3. * Jurisdiction 22. F. N. B. 120. L. The executors of the lord shall have an action of debt for (f) relief, for it is but an improvement of the service, and so it was adjudged in 32 H. 8. Rot. 429. in Leak's case. *Vide* (10.) 11 H. 6. 11. 11 H. 6. 18. 34 E. 1. Avowry 233. But the lord himself shall (g) distrain, and shall not have an action of debt, as it is said in 7 H. 6. 13. 22 Aff. 52. A woman made a lease for life rendering the first 3 years 100s. and afterwards 40l. during the first 3 years she was disseised of the rent, and brought an assise, and adjudged maintainable, for in judgment of law all is but one rent, altho' it is divided in payment, *vide* 15 E. 3. Execution 63. But it was resolved, in the case at bar, that the arrears due in the life of the grantee

were

(a) Dy. 375. pl. 20.

19 H. 6, 42. a.

* 7 Co. 48. b.
(b) Co. Lit. 162. b.(c) Co. Lit. 162. b.
Fitz. Det. 180.
Postea 51. a.
7 Co. 39. b.(d) Antea 48. b.
Poph. 87.
Br. Det. 94.(e) Antea 49. a.
* Co. Lit. 162. b.(f) Co. Lit. 47. b.
83. b. 162. b.
3 Co. 66. a.Dall. 17. pl. 6.
1 Roll. 196, 665,
915 Dy. 24. pl.
149. Dy. 140.
pl. 37.B. N. C. 176.
Br. Det. 194.
Br. Relief 11.
Noy 43, 44.
O. Benl. 10.(g) Co. Lit. 47. b.
83. a. 162. b.
Dall. 17. pl. 6.
1 Roll. 596, 665.
Br. Det. 194.
Br. Relief 11.
Kelw. 133. pl.
111.

4 Co. 9. a.

were lost at common law. The second point resolved was, that Hobbesfield was not charged with the said rent by reason of these joint words; for although it is parcel of Crewelfield Grange, and that Henry Bere and Freleton had the reversion of the term, and so the land might be said in their tenure; yet so far as Henry Bere had not then Hobbesfield in his occupation, Hobbesfield is out of the said words, by reason of the said last clause, *scil. & ad tunc in tenura & occupatione Henrici Bere*. So that by reason of the conjunctive, which joins the tenure and (a) occupation together, nothing is charged, but so much of the said Grange only as was in the tenure and occupation of Henry Bere, and that was not Hobbesfield; *vide* for the exposition of this conjunctive (et) (b) 19 H. 6. 4. a. b. & 9 E. 4. (c) 42. b. in the case of a release. The third point resolved was upon the said statute of 32 H. 8. (d) cap. 37. And the doubt arose upon these words: "and it shall be lawful to every such executor, &c. of any such person or persons to whom such rent or fee farm is or shall be due and not paid at the time of his decease, to (e) distress for the arrears of all such rents upon the lands, &c. So long as the said lands, tenements, or hereditaments, continue, remain, or be in the seisin or possession of the said tenant in demesne, who ought immediately to have paid the said rent, &c. be in the seisin or possession of any other person or persons claiming the said lands, tenements, and hereditaments only, by and from the said tenant, by purchase, gift, or descent, in like manner and form as their said testator might or ought to have done in his life." And it was objected, that this case was out of the said act, for the said act extends only to tenants in demesne who immediately ought to have paid it, and that was in the case at bar, the grantor and those who claim only "by and from him;" and in this case lessee at will of the feoffee doth not claim only "by and from the grantor," but he claims "by and from the feoffee," and so out of the statute. And therefore it was said, that the feoffee of the feoffee, and so *in infinitum*, is out of the said act; and so, it was said, have like statutes been construed, which are *stricti juris*, because they restrain the common law, as W. 2. cap. 40. (f) in *cui in vita*, if the vouchee vouches over one within age, the parol shall demur, as it is adjudged in 18 E. 4. 16. a. So there it is said, upon these words (*expectet emptor*) that the feoffee of the feoffee is out of the said act. 16 E. 3. Age 47. agrees to the case of 2 feoffee 19 E. 3. Age 2. But it was adjudged, that altho' the lessee at will doth not claim immediately from the grantor, yet he is within the said act: for where things are due in right and truth, and become remediless by the act of God, *sc. by the death of him to whom they were due*, in such cases acts of Parl. which give remedy

(a) Hob. 171.
2 Roll. Rep. 261,
226. Palm. 320.
4 Leon. 115.
Lit. Rep. 25, 63.
Cr. Car. 130, 448,
473. Godb. 237.
Hard. 225.
Co. Lit. 249. b.
1 And. 178.
1 Leon. 251.
(b) 5 Co. 7. b.
(c) 5 Co. 7. b.
Fitz Release 14.
Br. Release 29.
(d) Co. Lit. 162. a.
1 Leon. 302, 303.
3 Leon. 59, 263.
(e) 5 Co. 118.

(f) 1 Co. 15. a.
Plewe. 17. b.
47. a.
2 Inst. 455.
2 Leon. 148.
6 Co. 5. a.
2 Roll. Rep. 246.
Br. Age 43.
46 E. 3. Age 76.
7 E. 2. Age 139.
14 H. 7. 18. b.
19. a.
6 E. 3. 216. b.

in such cases, God forbid that they should not have a benign and favourable interpretation, and extend to advance the remedy proportionably to the mischief and defect of the law, according to the intent and meaning of the makers of the act.

(a) 3 Leon. 263.
1 Leon. 302, 303.

And therefore the second (a) feoffee, and so over *in infinitum*, shall be charged by force of this act, for what reason will there be to bind the first feoffee, and not the second feoffee, and so all others? And what reason will there be to bind only the immediate heir who shall have it by descent, and not any other mediate heir? For otherwise as to this point the statute will serve to little purpose, and especially when the first feoffee may alien the land at his pleasure; and all the sons of Adam are subject to death: some also conceived, that the second feoffee is within the express words of the act, for although he is not *in* "by the grantor," yet he is *in* "from

(b) Co. Lit. 162. b.
(c) 2 Sid. 54.
Godb. 363.

"him," for "from (b) him," amounts to as much as "under him;" and the word (c) (and) in this case shall be taken for (or) and this word (only) was added only to this purpose, that he ought to claim only under the tenant in demesne, and not paramount. As if tenant in tail makes a feoffment in fee and dies, and the discontinuee charges the land with a rent in fee, and afterwards enfeoffs the issue in tail within age, so that he is remitted, in that case (only) has its operation, for now the issue in tail claims by title paramount: but if the tenant makes a feoffment in fee to the use of another, in that case *cestuy que use* doth not claim only by the feoffor, but also by the statute, and he is not in the *per*, and yet he claims under the feoffor, and that was the intent of the act: so if the tenant makes a gift in tail, and the donee dies, the issue in tail is within this statute, for he claims (only) under the title and estate of the tenant in demesne, although he does not claim only by descent, but also *per formam doni*: so if tenant in tail be, the remainder over in fee, the issue in tail is within this statute, against the opinion in Plow. Com. in Manxel's case 4. b. But it was agreed *per totam curiam*, if

3 Co. 62. b.

(d) Vaugh. 40,
41.
1 R. ill. 672.
Co. Lit. 162. b.

A. has a (d) rent-service, or rent-charge in fee, or for life, and the rent is arrear, and afterwards A. grants over the rent to another, and the tenant attorns, and afterwards A. dies, his executors are not within this branch, for by the said grant over, the arrearages were lost, and were not due to the testator at the time of his death, as the statute speaks. Also the conclusion of the said branch is, "In as large and ample manner as the said testator might and ought to have;" and after the said grant the testator himself nor any other could distrain, or have any remedy for the said arrears: also in the clause next preceding touching the action of debt, the words are, "unto whom any such rent or fee farm is or shall be due, and not paid at the time of his death:" so that the act gives no remedy when the testator himself by his own act has dispensed with the arrears, but when they were due

due to him at the time of his death, and by the act of God become remediless: and in this case a judgment upon another branch of this statute, reported by Serjeant Bendloes, between Sharp (a) plaintiff, and Pool, defendant, in *Communi Banco*. Hil. 17 Eliz. in debt, London, 457, was cited, and the case was, a rent-charge was granted by deed to a feme-sole for life, the rent was arrear, the woman took Sharp to husband, the rent was again arrear, the wife died, Sharp brought an action of debt against the defendant heir of the grantor (tenant of the land charged) for all the said arrearages, as well before as after marriage: and in that case it was resolved, that for the arrearages incurred (b) before the marriage, the husband had no remedy by the common law, but for the arrears which incurred (c) during the marriage, the husband in that case might have an action of debt at the common law, 26 E. 3. 64. 10 H. 6. 11. a. b. F. N. B. 121. c. 22 H. 6. 25 a. But it was adjudged by force of these words in the said act, "that if any man hath, or hereafter shall have in the right of his wife any estate in fee-simple, fee-tail, or for term of life, of or in any rents or fee farms, which be or shall be due behind or unpaid in the said wife's life, that then the husband, after the decease of his said wife, his executors and administrators, shall have an action of debt for the said arrearages against the tenant of the demesne that ought to have paid the same, his executors or administrators: and also may distrain for the said arrearages in like manner and form as he might have done if his said wife had then been living, &c." That the husband should have (d) all the arrearages, as well due before the marriage as after: but two objections were made, that the husband should not have the arrearages before the coverture: 1. Because by the common law, the executors or administrators of the wife, might have an action of debt for the said arrearages before the coverture; and the statute, as appears by the preamble, provides remedy when the executors or administrators of him to whom the rent was due, "cannot have or come by the said arrearages, &c." And therefore it was said, that the makers of the act did not intend to give remedy where there was remedy at the common law, nor to take away the remedy which one had at the common law, and give it to another. The second objection was, that the said branch touching the husband, gives remedy to him for the arrearages "due in the said wife's life;" so that the arrearages ought to incur when she was a wife, and not before. But notwithstanding these objections, it was unanimously resolved, that the husband by force of the said branch, should have the said (e) arrearages; for the said branch enacts, that the husband shall have the arrears incurred in the life of his wife, and that cannot extend

(a) N. Bendl. 263.

pl. 273.

Bentl. in Ash. 31.

Bentl. in Kelw.

214. b. Co. Lit.

162. b. 135. b.

Ow. 3. O. Bentl.

33.

Co. Ent. 119.

pl. 2.

1 And. 47.

(b) 1 Rolle 345.

Co. Lit. 162. b.

351. b.

(c) Co. Lit. 162.

b. 351. a.

1 Rolle. 345; 352.

(d) Co. Lit. 162. b.

351. b.

1 Rolle. 345.

(e) Co. Lit. 162. b.

351. b.

1 Rolle. 345.

to arrearages during the coverture, for the common law, in case when the wife has the rent but for life, gave him such arrearages as appears before. And therefore when the statute gives an action of debt to the husband for arrearages, it ought not to be construed to extend to those which he might have by the common law before, but to the intent that the words of the act should have effect, for (a) (*verba accipienda sunt cum effectu*) the said words of the act should be construed of arrearages which were due before: and as to the said exceptions it was resolved, that a feme (b) covert could not make an executor without the assent of her husband and the (c) administration of her goods of right belongs to the husband, and the statute in naming the woman (wife) intended only to design and describe the condition of the woman, and not to imply that the arrearages should incur after the coverture.

(a) 10 Co. 28. a.

(b) Mo. 339. 340.

Fitz. Devise 24.

1 Rolles 912.

Cr. Car. 106.

12 H. 7. 22.

Perk. 97. a.

18 E. 4. 11. b.

Fitz. Testament

13.

1 Roll. 914.

12 H. 7. 23. a. b.

39 H. 6. 27. b.

Br. Testament 10. Br. Executors 98. Fitz. Executors 98. (c) 1 Roll. 910, 912. Dyer 251. pl. 90. 1 Jones 176. Cr. Car. 106. Mo. 871. 1 Leon. 216. 29 Car. 2. cap. 3. 1 Mod. Rep. 231. 1 Sid. 409. Mob. 3. Palm. 521, 522. See 3 Salk. 21. 1 Salk. Tit. Administrator, &c.

RAWLYNS'S Case.

Mich. 29 & 30 Eliz.

In the King's Bench.

BETWEEN Rawlyns and Somerford the case in effect as it was found upon special verdict upon not guilty pleaded in *ejectione firmæ*, for an house called the Ship without Temple-bar, was such; Peter Cartwright being possessed of the said house for 30 years, of all in possession, except a stable whereof one Warlow was possessed for two years, assigned all his interest to Rawlyns; and afterwards Cartwright by deed indented demised the said stable to Warlow, for six years after the said two years ended: and afterwards Rawlyns by deed indented in consideration of 25*l.* fine to be paid, re-demised all the house to Cartwright for 21 years, rendering to him 24*l.* *per annum* quarterly, and 5*l.* quarterly at the same feasts until the said 25*l.* were paid; upon condition, that if the said sum of 25*l.* or the said rent was arrear at any feast, &c. that then it should be lawful for Rawlyns to re-enter; and upon the back of the said indenture of re-demise was indorsed in this manner, "Memorand' it was agreed between the parties before the sealing and delivery hereof, that Warlow shall have the said stable according to the said demise to him made." And afterwards and before any day of payment, Cartwright re-demised the said stable, which then was in possession of Warlow, by force or colour of the lease for six years made to Warlow, to the said Rawlyns for ten years; and afterwards the rent was arrear and lawfully demanded, and also the 5*l.* parcel of the sum in gross was also not paid; and Rawlyns never entered into the stable, but Warlow always continued in possession of it, and Warlow never attorned to any of the lessees; and if the entry of Rawlyns for the condition broke was lawful or not was the question? And after many arguments at the bar and bench, now in this term it was adjudged, that the entry of Rawlyns for the condition broke

4 Leon 116.
Gouldf. 89, 93,
94. Jenk. Cent.
25. 3 Keb. 500,
505, 541, 542.
10 Co. 51. a.
1 Sal. 47, 48.

Lit. Sect. 58.

(a) Noy 118,
119. Palm. 260.
Jenk. Cent. 254.
8 Co. 162. b.
Co. Lit. 260. a.
2 Leon 194.
Salk. 53.
(b) 5 Co. 22. a.
1 Rolle 450.

(c) Jenk. Cent.
254.

(d) Jenk. Cent.
254.

Co. Lit. 148. b.

5 Co. 55. b.

(e) Owen 41.
3 Leon 121.

(f) Co. Lit.
158. a. b. Cr.
Car. 101.
1 Vent. 277.

broke was lawful. And in this case seven points were unanimously resolved by Sir Christ. Wray, C. Justice, Sir T. Gawdy, "and the whole court." 1. Whereas the verdict was entered three terms past, and in the entry thereof in the roll, the said demise made by Cartwright to Warlow was not entered to be made by deed indented, and now in this term it was prayed to be amended; and because the note of the special verdict which the jury exhibited to the court, and which remained with master George Kemp, secondary to master Roper, purported that the jury found the said demise, *prout*, &c. by which it appeared to the court, that the demise was given in evidence, and reference made by the note to it; it was therefore held "by the whole court," that the record in this point should be (a) amended; and so was it done in like manner in *account* between Gomersal and Gomersal in this very court within two years before. 2. Although the condition consisted of two parts in the (b) disjunctive, *sc.* either for non-payment of the rent, or of the sum in gross, which as to *that* was collateral; yet if it had been found that Cartwright had re-demised any part of the house to Rawlyns, and that Rawlyns had entered, by which the rent was suspended, that thereby the whole condition, as well as to the said collateral sum as to the said rent was suspended. For it was resolved, although the condition comprehended two several things in this disjunctive of two several natures; the one, the rent (c) issuing out of the land which is incident to the reversion, and may be suspended by the intermeddling with the land; the other, matter (d) collateral to the land, which cannot be suspended by the said re-demise, yet here are not several conditions, but one entire condition which refers to two several branches, and therefore suspended in part is suspended in the whole; and that the condition was entire, appears by the conclusion of it, *sc.* for the non-payment of the one or the other, it should be lawful for the lessor to re-enter into the whole land, so that there is but one entire condition, and one entire entry, which is not by the act of the parties to be apportioned or divided, and because this point was of late, *sc.* *Pasch. 27 Eliz. Rot. 185.* between (e) Brightman and Somersford in this very case (although between other parties) upon grave advice adjudged by Sir Ed. Anderson and his companions, Justices of the court of C. B. Sir Christopher Wray, and the court of King's Bench would not suffer this point to be argued again, but agreed with the said court of Common Pleas in the point adjudged. 3. That if Cartwright had re-demised any part of the house to Rawlyns, and Rawlyns never entered into it, yet the rent by the acceptance of the re-demise before any entry, is (f) suspended; so that the non-entry of Rawlyns makes no difference between this case, and the case which was in the Com. Pleas; for when the lessor accepts a

re-

re demise, and suffers a stranger to occupy the part re-demised, it suspends the rent, as well as if he himself had entered. 4. That the said lease made by Cartwright to Warlow by indenture when he (a) had nothing in the house, was, notwithstanding, good against him by conclusion; and when Rawlyns re-demised the whole to him, then was his interest bound with this conclusion, and then when Cartwright re-demised the said stable to Rawlyns, now was Rawlyns concluded also. For all parties and privies in estate or interest are bound by estoppels, and then the case is no other; but Cartwright demises to Warlow for six years the said stable, and afterwards demises to Rawlyns for 20 years, so that this is a good lease in reversion for 14 years, this doth not make any suspension of the rent, or condition, for it is not any grant of the reversion, but a future interest in reversion, no term but an interest of a term as the pleading is; and notwithstanding such grant, the reversion (without attornment) remains in the grantor, and he shall have the rent reserved upon the first lease: but if there be attornment, then the reversion passes, and then will follow suspension: and therefore it was agreed, if a man (b) makes a lease for 21 years rendering rent, with clause of re-entry, and afterwards the lessee makes a lease to the lessor for six years to begin two years after, and afterwards the rent being lawfully demanded, is arrear, the lessor may lawfully re-enter and take advantage of the condition, notwithstanding the acceptance of the said future interest, and by the † entry defeat the future interest which was vested in him: if a man makes a feoffment in fee upon a (c) collateral condition, and afterwards the feoffee re-demises the land to the feoffor, and afterward the condition is performed, now the re-demise of the land being no suspension of the condition, is no impediment but that the feoffor shall take advantage of it, and thereby destroy the term which he himself has accepted, as it is held 20 E. 4. 19. a. 8 H. 7. 8. 20 H. 7. 4. So in the case at bar, the re-demise *in futuro* makes no suspension of the rent, and *per consequens* no suspension of the condition. 5. Although it was objected, 1. That (d) estoppels conclude the parties to say the truth, but cannot conclude the jurors because they are sworn *ad veritatem de & super præmissis dicendam*: and 2. That estoppels ought to be pleaded, and in pleading the party ought in the conclusion of his plea to (e) rely upon the estoppel, and not demand judgment if action, or make other conclusion, as it is held in 22 H. 6. 53. and for these reasons the court shall not give regard to this estoppel by deed indented found by the jurors: yet it was resolved in this case, that this estoppel being found by verdict, the court ought to judge upon the whole special matter according to law: and true it is, that the jurors are sworn *ad veritatem dicere*: and therefore they have done well in the case at bar to find

(a) Cr. Car. 110.
Heti. 83. Jenk.
Cent. 254.

(b) 1 Rolle 939.

† Carthew 260.

(c) 1 Rolle 939.
1 Co. 97. a.
Jenk. Cent. 254.
3 Keb. 505.
1 Co. 174. a.
2 Brownl. 228.

(d) 2 Rolles 690.
Cr. Car. 110.
Co. Lit. 227. a.
352. a. Cr. El.
36, 37, 140,
309. Jenk. Cent.
254. 2 Co. 4. b.
Owen 96.
1 Leon 206.
Sav. 98, 99.
Dyer 147. pl. 73.
Cart. 155. Palm.
20. Hard. 483.
2 Brownl. 150.
Heti. 83. Moor
96. Lit. Rep.
271, 273. Latch.
241.
(e) 2 Jones 8.
Co. Lit. 227. a.
Hob. 207. 11
Co. 12. a. Doct.
pl. 158.

(a) Moor 69.
2 Leon 159. Co.
Lit. 227. a. Cr.
El. 36, 37, 140,
309. Lit. Rep.
271, 283.

Co. Lit. 228. a.

Co. Lit. 228. b.

(b) Lit. Rep.
371.

• St. 27 El. c.8.
See 2 Sand. 213.
(c) 1 Siderf. 173.
Lit. Rep. 60.
Hettl. 52.
1 Jones 177.
Hutt. 92. Cr.
El. 424, 541.
Palm. 295.

find the whole truth of the case, and leave the judgment of it to the court, which upon the whole matter ought to judge according to law. And Wray C. J. said, that it was adjudged in (a) Pleadal's case, in 8 Eliz. that because a jury did not find such a lease by deed indented which took its operation only by conclusion, intending that they being sworn *ad veritatem dicendam*, and that estoppels conclude the parties, but not the jurors to say the truth, were therefore attainted and had judgment accordingly; for the Justices in the same case held, that the interest of the land as to parties and privies was in a manner by such conclusion bound, and no conclusion shall be by such deed indented after the term ended, as Wray Chief Justice held, and in such case the jury ought, if they will not find the special matter, and leave it to the judgment of the law, to find "at their peril" according to law. *Vide* for this point, 17 E. 3. 6. 18 Aff. 2. 22 Aff. 2. 22 Aff. 37. 34 E. 3. Droit 29. 15 E. 3. Affise 372, 13 E. 3. Gar. 26. 35 Aff. 8. 1 H. 4. 6. b. 27 H. 8. 22. Plow. Com. 515. and many other books. And upon good consideration of this judgment and the said books, you shall understand and observe good differences, and which opinions in the books are according to law, and which not. 6. It was resolved, that if a man has land for 20 years, and he leases for two years rendering rent, and afterwards grants his whole term and interest to another, if the lessee attorns, the reversion shall pass; and if no attornment is had, yet the interest in reversion shall pass, so that the grantee shall have the land after the two years determined; for the grant of one shall not be adjudged void, if to (b) any intent it may take effect. 7. It was resolved if lessee of an house for 20 years, leases part for two years, and afterwards leases the whole to another for ten years rendering rent, so that this enures as a lease in reversion for the part in lease, and a lease in possession for the residue, that the rent shall issue out of the whole, and the interest of the term, although it is not any estate which can be surrendered, and although it is joined with land in possession, yet the rent shall issue out of the whole: upon which judgment Somersford brought a writ of error upon the new statute upon the judgment, and two errors were assigned. 1. Because Rawlyns the plaintiff was an (c) infant, and was admitted by guardian, and no record thereof was made as is used in C. B. but only recited in the count; *J. Rawlyns per A. B. gard' suum ad hoc per cur' specialiter admif. queritur, &c.* 2. The 2d error was assigned in the judgment itself given in B. R. As to the first error the judges Anderson C. J. of C. B. Manwood Chief Baron of the Exchequer, Periam, Windham, and Rhodes Justices, Clark and Gent Barons of the Exchequer, and of the coif, ordered the precedents in B. R. to be searched, for without precedents, *prima facie* it seemed to them, that there ought to be a record made of the said admittance by guardian; and on search of the records in B. R. many were

were found and shewed to the Justices, where (a) infants had sued by guardians in the same court, and no record made of their admittance by guardian, but such recital in the count as aforesaid: the Justices and Barons *una voce* in regard of the precedents which in this case make a law in the same court disallowed the error, although precedents *in minuto numero* were shewed, where record was made of the like admittance of an infant in the King's Bench, as is done in the Common Pleas. As to the error in the judgment, all the said points often argued in the King's Bench, and upon great deliberation adjudged, were again argued before the said Justices and Barons of the Exchequer; and after many arguments at the bar and bench, all the matters before resolved were from point to point, and for the reasons before alledged, affirmed by all the said Justices, and judgment given accordingly. Ed. Coke and others were of counsel with the plaintiff, and Glanvill Serjeant and others with the defendant. And this was the last case that Sir Thomas Gawdy argued, who was a most reverend Judge and sage of the law, of ready and profound judgment, and of venerable gravity, prudence, and integrity.

Nota reader, according to the opinion of Wray Chief Justice, it was afterwards adjudged in the Common Pleas, *Pasch.* 33 *Reginæ Eliz.* in the case of one London, that if a man takes a lease for years by deed indented of his own land, it is no conclusion but during the term, and after the end of the term the lessor may enter or occupy the land, for by the determination of the term, the estoppel is also determined, and then both the parts of the indenture belong to the lessor, as it is held 38 H. 6. 24. And so the law is now resolved in a case which was much controverted in our books, 14 H. 6. 23. 8 H. 4. 58. 3 E. 4. 14. 8 H. 6. 17. 44 E. 3. Estoppel 10. 43 E. 3. 17. 21 H. 6. 2. 43 E. 3. Estoppel 7. 3 H. 4. 6. 12 H. 4. 19. Litt 156. (17) 47 Aff 3. 35 Aff. 8. 10 E. 3. Double Plea 8. The opinion of Hales and Montague in Pl. Com.

(a) 1 Siderf. 17.
Lit. Rep. 60.
Hettl. 52. 1 Jones
177. Hutr. 92.
Palm. 295.

London's Case.
1 Anderson 12.8.
Moor 181.
1 Rolle 871, 877.
1 Jones 459. Lit.
Rep. 372. Co.
Lit. 47. b. Cr.
Eliz. 36. Jenk.
Cent. 254.

The Warden and Commonalty of Sadlers Case.

Trin. 30 Eliz. in Chancery.

Monstrans de Droit

1 Anderf. 180,
181. Co. Ent.
402. pl. 1. 9 Co.
95. b. 96. a.
See Skinner 608,
609.

(a) 1 Anderf.
180, 181. 1 Co.
173. 2 Rolle
Rep. 421. 2 Inft.
688.

(b) 2 Bulst. 193.
8 Co. 129. a.
1 Rolles 556.

BY virtue of a writ of *mandamus* after the death of Thomas Cox, it was found by inquest before Wolstan Dixy Mayor of London, Escheator of the said city 17 Junii, anno 28 Eliz. and returned in the Chancery, that the said Tho. Cox, *die obitus sui* was seised in his demesne as of fee, of 11 messuages and 8 gardens in the parish of All-Saints in London, and died without heir, and that they were held of the Q. in socage: and the wardens and commonalty of Sadlers in the Chancery shewed their (a) right, that long time before the said Thomas Cox had any thing in the said messuages and gardens, one Richard Mylard was seised of them in his demesne as of fee. And being so seised 6 die Aug. anno 15 H. 8. by his will in writing devised the said messuages and gardens to the wardens and commonalty of Sadlers in fee, and died; and that they were seised until by the said Thomas disseised, who so seised died without heir: and shewed the custom of London, that a citizen (b) and freeman may devise in mortmain; and averred that the said R. Mylard was a citizen and freeman of London, at the time of his death: upon this plea the Attorney-General demurred in law; and if a *monstrans de droit* in this case lay, or they should be put to their petition was the great question of the case: and this case on the Q.'s part, and on the parts of the wardens and commonalty was often argued as well *in Can'* as before all the Justices of Eng. and Barons of the Exchequer at Serj. Inn in Fleet-street. And in this case divers points were resolved.

Is by mat-
ter of re-
cord, which
is either

1. By record judicial, as attainder, &c.
2. Ministerial on oath, as office.
3. Or by conveyance of record by assent as fine, deed inrolled, &c.

In every
case where
the King is
intitled to
any free-
hold or In-
heritance,
his title

Or by mat-
ter in fact,
and found
by office of
record on
oath,

As alienation in mortmain, purchase by alien born, the King's villain, escheat by death without heir, &c. and this found by record ministerial, as before the Escheator or other officer.

Or by mat-
ter in fact,
only,

When land comes to the King by escheat or other matter of fact, and the King's officers put it in charge in the Exchequer without office.

And it was resolved that in all these cases, at the common law, when the King was seised of any estate of inheritance or freehold by any matter of record, be his title by matter of record judicial or ministerial, or by conveyance of record, or by matter in fact, and found by office of record, he who has right could not by the common law have any traverse upon which he was to have *amoveas manum*, but was put to his "petition of right" (in nature of his real action which he could not have against the King, because the King by his writ cannot command himself) to be restored to his freehold, and inheritance, 4 H. 6. 12. 24 E. 3. 23. 1 H. 7. 3. 4 E. 4. 21. b. 9 E. 4. 52. But at the common law the party grieved might in some case have his *monstrans de droit* where the King was so entitled, and in some case not, when the King's title was by matter in fact, as by reason of purchase by an alien born, or the King's villain, or for alienation in mortmain, or by death of the King's tenant without heir, &c. in all these and the like cases, if office be found for the king, and in the same office the title or interest of the party be found, there the party grieved might at the common law have his *monstrans de droit*, because his title appears by the same record, whereby the King is intitled; as if a disseisor aliens in mortmain, or to an alien born, or to the King's villain, or dies without heir, the land being held of the King and all the special matter is found by office, *sc.* the disseisin and the alienation, or the death without heir, in all these cases the party grieved should have *monstrans de droit* at common law; and so are the books to be intended in 9 E. 4. 51. & 13 E. 4. 8. a. 4 E. 4. 21. 33 E. 3. Traverse 36. It was found by office that T. by licence of the King did marry the King's neif, and that certain lands descended to the same neif, which her husband aliened without the King's licence (his wife being the King's neif) to another, and for this cause the land was seised; whereupon the alienee came into the Chancery and shewed all his case which was found by the office, and because the whole truth of the case, *sc.* The King's neif, married by his licence; 2. The descent to the neif after the coverture appeared in the office; it was awarded, that for this cause the husband might hold by the (a) courtesy, and by his alienation put the wife to her action, and thereupon by award the alienee had restitution: by which case it appears; first that the woman being married by the King's licence, is enfranchised (b) at least during the coverture, for if she should remain neif, then the husb. should not be tenant by the courtesy; for when the K's title, and the title of a subject concur in the beginning, the K's title shall be (c) preferred, as Weston holds, Plow. Com. 263. b. 2. That when the whole truth of the case appears in the office, that there was *monstrans de droit* at the common law: so if land was conveyed to the King upon condition,

2 Cro. 186.
1 Roll. Rep. 95.

(a) 1 Leon. 47.
Co. Lit. 30. b.
Goldsb. 29.

(b) Co. Lit.
30. b. 136. b.
137. b. Doct. &
Stud. 140. a.
4 Ed. 4. 25 per
Danby.

(c) Co. Lit. 30 b.
9 Co. 129. b.
Hard. 24.

The Case of the Wardens and Part IV.

2 Rolle 215.
Hard. 13.

Br. Livery, &c.
42. Br. Office
Antea, &c. 19.

dition, if the performance of the condition be of record, as if the condition be to levy a fine of other land to the King, or to make a recognizance to the King in any court of record, or other like conditions which are to be performed of record; he who has performed the condition may have his *monstrans de droit* at the common law, for his title appears of record, and there is no record which absolutely entitles the King: but if the performance of the condition be not on record, then if the performance of the condition be found by office, he shall have *monstrans de droit* by the common law, *vide* Plow. Com. 229. But in the same case, if the office finds only title for the King, and omits the right or title of the party, although all the words of the office are true, yet by the common law he cannot have *monstrans de droit*, but for the reason aforesaid he was put to his petition, and therewith agrees Piers Partifield's case in 29 Aff. p. 31. it was found by force of a writ of *diem clausit extremum*, that one held certain lands of the King in London and died seised without heir, wherefore the King gave the lands by his letters patent to Piers Partifield for his life, who sued a writ to the Mayor of London to put him in seisin, and thereupon nothing was done, for which cause he sued *sicut alias, vel causam nobis significes*, upon which writ the Mayor returned, that the King's same tenant, by his will in writing and enrolled before the Mayor, devised the land to his wife for life, and that she or her executors should sell the reversion for his soul, and that the wife and John Dagle her now husband were *in* by the said devise, wherefore he could not make livery; and afterwards P. Partifield by force of the King's patent entered; whereupon John Dagle and his wife sued a *Scire facias* against Piers P. if he could say any thing wherefore they should not be restored. Piers P. demanded judgment of the writ for two reasons: 1. Because he held but for life, the reversion to the King, in which case, suit should be made against the K. 2. Since an office was found for the King he should not have this suit before *that* upon his petition an office be found as it ought to be intended for him, and so before he is admitted to shew his right, he ought to have his right as well found by office, as the King's title was found by office, for that is *æquale jus*: to which it was answered: 1. That since they were seised of the freehold, that they were not to be ousted without suit. 2. That against the King, petition could not be sued, because Piers was tenant of the freehold. 3. That this matter returned by the Mayor, &c. should serve for an office, but for the office the reverse of the matter was not found; which is as much as to say, that the whole matter found by the office was true, *scil.* that the tenant held the land of the King and died without heir, and by the said devise it was confessed and avoided. And to decide these questions, all

all the Justices of England were assembled in the Chancery; and by the award of all the Justices the writ was abated, because no office was found for John Digle and his wife, and they were directed to sue to the K. (*sc.* by petition) for an office which might serve them. Out of which award of all the Justices I observe these things: first, that at common law when by office the King was seised of an estate of freehold, although all the points of the office were true, yet the party grieved was put to his petition in nature of his real action, unless his title was found by the office. 2. That a petition lies to the King although he has departed with the freehold. 3. That forasmuch as the K's title is found by inquest of office upon oath, the title of the subject ought to appear by record of as high nature, *sc.* by like inquest of office upon oath, and not by the return of the Mayor, which although it is of record, yet it is not of so high and great regard in law as the office found by oath: so *nota*, judicial records, as attainders and judgments, are preferred before ministerial records, as inquisitions, and offices before Escheator, and they also being found in course of lawful proceeding by oath before returns, or conveyances of record, as hereafter more fully appears to you in this case. And in 30 Ass. pl. 28. by *diem clausit extremum* it was found, that J. held of the K. and that M. was his daughter and heir, who was of full age and had livery; and by another office it was found, that the same J. had another daughter K. who was yet within age, by which a *Scire facias* issued against the said M. and her husband, &c. who said, that the land was given to J. and to his first wife, mother of M. in tail, and that K. was the issue of another wife, and so M. sole heir. But by award of the whole council (*sc.* the Justices, who are as to administration of justice called in law the council) all the land was seised into the K's hands, because the tail was not found by any office, but only that M. was general heir, so at the common law, if the King by false office was possessed of the custody or interest in any land by reason of ward, or ideocy, or alienation without licence, or the like; in such cases, although the King was not entitled to a freehold, but to a chattel real, and by false office only, yet the party grieved could not have a traverse, and thereupon to have *Amov' manum*, but was put to his petition by the common law; and therewith agrees the book in 17 E. 3. 11. a. b. But yet as well a traverse as a *monstr' de droit* was at the com. law, as well concerning freehold and inheritance, as chattels real, for in all cases when by the office land is not in the K's hands, nor the K.

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thereby

Stamf. Prær.
83. b. Br. Office
Antea 21. Br.
Refeiser proRege
25. Br. Scire
fac' 220. Co.
Lit. 77. b.
Postea 56. b.

Co. Lit. 77. b.

thereby in possession, but the K. by the office is only entitled to an action, and cannot make a seizure without suit, there, in a *Scire facias* brought by the King in the nature of such action to which he is entitled, the party may upon the said *Scire facias* appear, and traverse the office at the common law, for the party is in possession, and upon the matter found for him shall not have any *Amoveas manum*, because by the office nothing was in the K's hands, but the K. shall be barred of his action. And therefore if it is found by office that the King's tenant has (a) ceased for two years; or that the K's tenant for life, or years has committed waste, or that his tenant by knight's service has made a feoffment by collusion, in these cases the King is put to his *Scire facias* against the tenant, and in all these cases the tenant in the *Scire facias* might traverse the cesser, waste and collusion at the common law, and therewith agree the books in 14 (b) H. 7. 23. a. & 25. a. (c) 15 H. 7. 6. b. & 12 H. 7. 21. b. it appears also by a book before any statute made which gives traverse, or *monstrans de droit*, (d) 30 Ass. 28. 32 E. 3. *Scire facias* 106. 32 E. 3. Fitz. Traverse 38. (e) 50 Ass. 2. It was found by office that W. the K's tenant *in capite* died, and that the tenancy descended to R. his son and heir who is a fool and idiot from his birth, and that N. was terre-tenant, against whom a *Scire facias* issued, if he could say any thing that the land should not be seized into the King's hands, who came and pleaded that this R. after the death of W. released to one F. then tenant, all the right, &c. who enfeoffed him, at which time R. was of good memory; and traversed the point of the office *scil.* without that, that Richard was a fool from his birth, for it would be in vain to award a *Scire facias* to know if he can say any thing, &c. and when he comes that he should plead nothing: but if the office finds no other in possession but the idiot, thereby the K. is in possession, then he who in truth was terre-tenant and is ousted by the office, cannot traverse the office to have *Amoveas manum*, because it doth not appear by the office, that he was tenant at the time of the office, but is put to his petition: but forasmuch as in case when the K. was in possession by the office, or might seize without suit, there the party was put to his petition, which suit was tedious, and of great delay and charges to the party grieved, for his relief was the stat. of (f) 34 E. 3. cap. 14. made, by which it is enacted, that where lands or tenements are seized into the K's hands by office of the escheator, containing that the K's tenant made thereof alienation without the K's licence, &c. out of which words divers things are to be observed: 1. where it is said, where lands or tenem. are seized into the K's hands, &c. it thereby appears that the mischief was, where the lands or tenem. were seized into the K's hands by the office, for it was not any mischief as has been said, where the K. was entitled but to the action, for there was traverse at the common law. 2. That this act extends

Vaugh. 62.

(a) Kelw.

33. a. b. 200. b.

9 Co. 96. b.

Stamf. Præer.

55. a. b. 3 Co.

11. a.

(b) Br. *Scire fac'*

122. Stamf. Præer.

55. a.

(c) Stamf. Præer.

55. b. 9 Co.

95. b. 96. b.

(d) Stamf. Præer.

83. b. Antea 56. a.

Br. Office Antea

21. Br. Releifer

pro Rege 25. Br.

Scire fac' 220.

Co. Lit. 77. b.

(e) Br. Alienat.

14. Br. Idiot 2.

Br. Traverse de

Office 22. Br.

Office devant 24.

Postea 126. b.

Br. Feoffment de

&c. 63.

(f) Kelw. 178.

pl. 11. 4 E. 4.

21. b. Br. Peti-

tion 28. Br. Tra-

verse 33. Fitz.

Traverse 5.

3 Cro. 523.

Stamf. Præer. 61.

Moor 659.

tends only where the K. was entitled by office only, for the words are, "seised into the King's hands by office of the escheator."

3. That this act extends only to the case of alienation without licence, and to the case of ward. But three things were grievous to the people which were not remedied by this act. 1. That no office was within the purview of this act, but only office found *virtute brevis*, or *commissionis*; for the words are (taken by the K.'s commandment) so that an office found *virtute officii*, was out of this act. 2. That the said act, as appears before extends only to the said two cases of alienation, without licence and of ward. 3. That the said act extends to a traverse only, and not to *monstrans de droit*, by which although on the traverse the issue was found for the plaintiff, yet the Judges could not proceed to judgment without a writ *De procedendo ad judic*, which were great and grievous mischiefs; for remedy of which another stat. was made, anno 36 E. 3. cap. 13. for the grievous complaints which the King had heard from his people of his Escheators, &c. He willed and ordained, with the assent aforesaid, that lands seised into the King's hands for cause of ward, be safely kept without waste, &c. So of other lands seised into the King's hands by inquest of office taken before Escheators, which words are general. 1. As to the matter, for they are not restrained to the two things, *sc.* alienation without licence, and ward mentioned in the former act. 2. As to the office, for they extend as well to offices found *virtute brevis*, *sive commissionis*, to which only the former act extended, as to offices found *virtute officii*. And as to the great objection which was made, that forasmuch as the words of the act are, that the Escheator shall send the inquest into the Chancery within the month, &c. that it ought to be intended of an office found *virtute brevis*, *sive commissionis*, because no office found before the Escheator *virtute officii*, could by the law be returned into the Chancery, but only into the Exchequer, as it is said in 4 E. 4. 24. a. & Stamf. Prærog. 70. b. To that it was answered and resolved, upon shewing of infinite precedents in all ages, that such offices had been returned by the Escheator as well into the Chancery, (a) as into the Exchequer, and the Escheator had election to return it into which of the courts he would, for he is attendant to both courts, and both are the King's courts: then the statute goes further, "and be heard without delay to traverse the office," (which words, as to the matter and manner of the office, are general, so that by these branches, the two first of the said defects were remedied) "or otherwise to shew his right, &c." by which the *monstr de droit* was given to make a final discussion without attending other commandment, by which words they shall proceed to judgment without any *procedendo*; and so all the said mischiefs were remedied. But it was resolved, that this act doth not extend to any judicial record, as attainder, or recovery, but only when

Kelw. 178. b.
3 Cr. 523.
2 Rolle Rep.
351.

(a) 1 Co. 42. b.
52. b. Moor 416.
4 Inst. 225.
Kelw. 173. a.
Ley de Gards 3.
Liveries 25.
Hard. 141.

(a) Hard. 81.

(b) 5 Co. 26. a.
2 Brownl. 191.
2 Co. 23. a.
6 Co. 43. b.
2 Inst. 359, 573.
Dav. 33. b.
5 Co. 111. a.

• Lane 58.

(c) Fitz Petit. 17.
Br. Petit. 10.
Br. Nonfuit 12.

(d) 36 E. 3. c. 13.
Antea 57. a.

(e) 34 E. 3. c. 14.
Antea 56. b.
Kelw. 178. pl. 11.

(f) Br. Office.
Antea 23.

(g) 3 Inst. 12.
Hales 17.
1 Inst. 390.
22 R. 2. nu. 9.
Cott. Rec. 378.
Stamf. Cor. 189.
a.
Plowd. 262. a.
263. a.
3 Inst. 12.
22 R. 2. nu. 27.
Cott. Rec. 381.
(b) 4 Inst. 73.
17 E. 3. 13. a.
2 Sid. 101.
(i) Fitz Petit. 13.
Br. Petit. 4.
Br. Sci. fac' 55.
Br. Traverse de
Office 5.

nothing appears of record for the King but only the office; and therein the makers of the act had great reason, for in case of attainder and office, the King is entitled by (a) double matter of record, wherefore the party grieved ought to avoid it by double matter of record, and not by single traverse, or *monstrans de droit*; for it was said, *nihil tam (b) conveniens est naturali æquitati, unumquodque dissolvi eo ligamine quo ligatum est*, and therefore he shall be put to his petition, upon which he shall have an office found containing his title of record, which is required by the justice of the law, because the King's title commences by record, and thereupon the party grieved shall traverse the King's title found by the office, or shew his right, and confess and avoid it; and if upon the traverse, or *monst' de droit*, it is found for him, or the King's Attorney confesses it, * then he shall have *Amov' man'*, for he has answered and satisfied double matter of record with double matter of record: *vide* 11 H. 4. 52. b. Another reason was when the King is *in* by force of a title by judicial matter of record, as by attainder or recovery, (c) there, for the estimation and credit which the law gives to judicial records, the party is put to his petition: these resolutions of the Justices in this case agree with our books. 1. That the statute of (d) 36 E. 3. extends to other cases, than to the case of alienation without licence and ward, which are mentioned in the act of (e) 34 E. 3. there are divers cases agreed in our books; and therefore 43 Aff. 28. it was found by office returned into Chancery, that one W. of (f) Herlington, who was seised of certain lands in the county of York, was aiding to Guilbert de M. who was the King's enemy, whereby the lands were seised into the King's hands, and thereupon came W. into Chancery, and traversed the office, and it was found for him, and he had restitution by judgment of the court, which special case is not mentioned in the act of 34 E. 3. but is included within the general words of 36 E. 3. *Cave lector*, for at this day although a man is aiding to the King's enemies, or is killed in open rebellion against the King, he shall not (g) forfeit his lands nor his goods; but if the Chief Justice of the King's Bench (who is supreme (h) coroner of all England) in person upon the view of the body of him killed in open rebellion makes a record of it and returns it into the King's Bench, he shall forfeit his lands and goods, as it was done and resolved in the time of H. 7. by Fineux, C. J. *Vide* 8 E. 3. 38. 7 H. 4. 47. and in 2 H. 4. (i) 10. b. Sir Tho. Talbot's case: the possessions of a Prior alien were seised into the King's hands for certain cause, and afterwards the King made livery thereof, &c. and after livery, the King by writ out of the Chancery had take them again into his hands by this word *resumpsimus*, and committed them to one Tutbury; and now came the executors of the said Sir Thomas,

mas, who had a term for years in the said possessions, and in the Chancery exhibited their traverse, and had a *Scire facias* against the said Tutbury, and there Skrene for the defendant demanded judgment of the writ, for where the King seises for cause, a man may have a traverse to the cause, and answer to it by the statute, meaning the said act of 36 E. 3. for this case of prior alien was not within the said act of 34 E. 3. But where the King seises into his hands, and determines no cause wherefore in certain, he ought to sue to the King by petition, *quod fuit concessum* by the Justices assembled together for this purpose in the Chancery. *Nota* reader, it thereby appears, that a termor may have a traverse in that case by the statute of 36 E. 3. But it was objected, that neither the stat. of 34 (a) E. 3. nor the stat. of 36 (b) E. 3. extended to the case at bar, because in this case the King was intitled to the freehold and inheritance, and the said acts give remedy only when the King is entitled to a chattel, as ward or alienation without licence, &c. To which it was answered and resolved, that the act of 36 E. 3. extends generally to lands seised, &c. by office, which is a beneficial law made in advancement and for execution of justice and right, without grievous and tedious delay, and therefore shall be taken as generally according to the letter and intent of the act, and with this resolution in this point agree the books 13 E. (c) 4. 8. a. 4 E. 4. 22. b. Lord Hungerford's case, 3 H. 7. 20. Lord Greystock's case. 49 E. 3. 16. a. b. Isabel (d) Goodcheap's case, & 19 R. 2. Travers 37. and so the *quære in Stamf. Prærog'* 61. well resolved; and the book in 8 H. 5. Traverse 47. is to be intended at the common law before the said act: it was also resolved, that when the King's tenant seised of lands in fee dies without heir, that the fee (e) and freehold is immediately after his death, and before office found thereof, cast upon the King; for in such case it ought to be in some person, and if any person enters into the land and takes any of the profits, an information of intrusion for the King may be preferred against him before office or seizure; for the K. immediately by the death is in actual possession, and has not only a freehold in law, as a common person, in such case has; and as to that, this difference was taken and agreed; when the King's tenant dies in possession without heir, so that in such case *possessio est vacua*, and in nobody, there the law will adjudge the K. (in whom no laches shall be reckoned) in actual possession immediately; but when another is in seisin and possession at the time of the escheat, so that *posses' plena est* (f) & *non vac'*, there the K. shall not be adjudged in possession till this seisin and possession is removed as if the K's tenant is (g) disseised and dies without heir; or if an alien born or the K's villain, or the alienee in mortmain is disseised and all this is found by office in these cases the K. shall not be in possession till the possession and seisin of the terre-tenant is removed; but if land descends to the K.

(a) 34 E. 3. c. 14.
(b) 36 E. 3. c. 13.

(c) Br. Traverse
d' Office 38.
Fita Trav. 9.
(d) 2 Co. 53. a. b.
8 Co. 76. b.
Lit. Rep. 123.
Godb. 443.
Cr. Eliz. 640.
Br. Escheat 32.
Br. Devise 10.
Fitz. Devise 8.
Plowd. 259. a.
Raym. 83.
Hard. 13, 14.
Swinb. 335.
2 Roll. Rep. 351.
2 And. 113, 114.
(e) 3 Co. 10. b.
9 Co. 95. b. 96. a.
Plowd. 229. b.
2 Roll. Rep. 321.
Cr. Car. 173.
Godb. 312.
1 Jones 71.
3 Leon. 187.
9 H. 7. 2. b.
Br. Office Antea
17, 34.
Br. Prærog. 91.
Br. E ch. 25, 33.
Moor 293.
Hard. 14.
(f) Hard. 14.
(g) Hard. 14.

The Case of the Wardens and Part IV.

after the death of his father, or any other collateral ancestor, the King shall be immediately in possession before entry or seizure: so if the King makes a lease for life, or a gift in tail, and the lessee dies, or the donee dies without issue, in this case the possession shall be actually in the King, without any entry or seizure, and therewith agrees (a) 9 H. 7. 2. b. and there it is expressly, said, that when no man is in possession, it shall be adjudged in the King, according to his title; and so the doubt which Stamford makes, Prærog. 53. b. well resolved: but it was hereupon strongly urged by one of the Justices, that in the principal case the Company of Sadlers should be put to their petition, for inasmuch as immediately after Cox was dead without heir, the possession was actually in the Queen; then before office found they were put to their petition, for the act of 36 E. 3. extends only in case where an office is found, for that is the record traversable by the statute; and therefore he said, if a disseisor conveys the land to the King, in that case the disseisee was put to his petition by the common law, and therewith agree 22 E. 3. 5. 24 E. 3. 23. 4 E. 4. 22. and that is not remedied by the said act; although the King is entitled by a record, yet it is not a record traversable by the said act: so he said when Richard Duke of York, father of King Edw. 4. disseised one and died seised, and it descended to King Edw. 4. now the disseisee was put to his petition; and therefore, although the descent was afterwards found by office, and although the King was entitled by office, and single matter of record only, yet he was put to his petition, and was not remedied by the said act, as appears in 9 E. * 4. 51. b. 2. It was objected, that the statute of 26 E. 3. cap. 13 extends only in case where one is put out of possession by the office, as Stamf. conceives, Prærog. 61. a. But in this case the Company of Sadlers was not put out of possession by the office, but by the disseisin made by Cox to them, and therefore this case was not remedied by the said act. But as to that it was answered and resolved, that it is a maxim in law, that when one common person against another common person is put to his real action, in such case he shall be put to his petition, (b) which is in lieu of his real action, against the King. Vide 7 H. 4. 33. 9 H. 4. 5. and therefore there is a great difference between the cases which have been put, and the case at bar; for, 1. As to the said case were land descends to the King from his ancestor, by this descent the entry of the disseisee is tolled, if it was in the case of a common person, and therefore in the case of the King he shall be put to his petition: but in case of escheat, when a disseisor dies without heir, if it was in the case of a common person, the entry of the disseisee was not tolled, but he might enter upon the lord by escheat; and although it should be admitted, that in the case at bar, the Company of Sadlers could not have their

monstrans

(a) 3 Co. 10. b.
9 Co. 95. b. 96. a.
Br. Offices Antea
34.
Br. Prærog. 91.
Br. Esch. 25. 33.
Plowd. 229. b.
Moor 393.
3 Leon. 187.

* 7 Co. 11. a.
Calvin's Case.

(b) 2 Co. 53. a.
Plowd. 489.
2 And. 112.

Lit. sect. 390.
Co. Lit. 240. a.

monstrans de droit before office found, and that it should remain at the common law not remedied by the said act of 36 E. 3. yet when office is found, it has relation to the time of the death of the tenant without heir, and now the statute of 36 E. 3. extends to it; and if it should be also admitted, that the case when a disseisor conveys land to the King, that that remains not remedied by the said act of 36 E. 3. because there is no writ traversable by the act in such case; yet forasmuch as in the case at bar, office is found, and that the record is traversable, the party grieved by the purview of the said act shall have *monstrans de droit*. And as to the second objection it was resolved, that the stat. of 36 E. 3. extends to this case, although the party grieved was not ousted by the office, for the words are, "and if there be any man that will make claim or challenge to the lands, &c." and that without question the party grieved does, for he makes challenge and claim to the lands found by the office; and the statute does not say if the party grieved be ousted by the office: and so the doubt which Stamford conceived in this point also well explained. And it was well urged, that the stat. of 36 E. 3. has provided remedy when the King by office is entitled to land, either by purchase of his villain, or of an alien born, or by alienation in mortmain, or by any such title, which is matter of fact, or in *pais*, and the office is the sole record which entitles the King, because the makers of the act of 2 E. 6. have provided remedy only when the King is entitled by double matter of record, as attainder of treason, felony, and *præmunire*, and office: and it was said, that if traverse and *monstrans de droit* had not been provided in the said cases of the King's villain, alien born, mortmain, &c. by the former act, without doubt they, for these cases also, would have provided remedy, because these would be in as great mischief if the party grieved should be put to his petition, as where the King was entitled by double matter of record: but it was said, if the King, lord, tenant in tail, the remainder over in fee, mesne and tenant be, and the mesne aliens the mesnalty in mortmain, or to the King's villain, or to an alien born, and upon office thereof found, the king seises, tenant in tail dies, the tenancy escheats, the issue shall not have traverse nor *monstrans de droit*, for the escheat is a thing newly accrued and dependant upon the seignior; and forasmuch as the King had the seignior at the time of the escheat, of necessity the land shall escheat to him *quousque*, &c. and he shall be put to his petition in such case, *vide* 8 H. 4. 9. *vide* Plowd. Com. Wimbiſhe's case. If a tenancy escheat to a woman who hath a jointure, it is out of the statute of 11 H. 7. And lastly, a judgment in the point now lately given in the Exchequer was vouched, where the case was, that by office returned into the Exchequer it was found, that Jane, wife of Theophilact Aden,

36 E. 3. cap. 13.

9 Co. 129. b.

Co. Lit. 77. b.

Plowd. 44. b.

Br. 61.

Inst. 365.

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was seised of certain lands in fee, and held them of the Queen, and died without heir, and one Collins and Howstead came into the Exchequer, and by way of *monstrans de droit* alledged, that one Nicholas Reynolds was seised of the said lands in fee, and by his will in writing devised them to Emme his wife in fee, and died; the wife did thereof enfeoff Collins and Howstead, by which they were seised until disseised by the said Jane, who died without heir, and so confessed and avoided the office. And by the rule of the court, the Attorney-general answered thereunto, and maintained the office, and traversed the devise, which was found against the Queen. Out of which judgment I observe, that the Barons adjudged the said act of 36 E. 3. to be taken by equity; for the said act speaks only of offices returned into the Chancery, and the said office was returned into the (a) Exchequer, which without question, was within the intent and meaning of the act, *vide* Stamf. Prærog. 70. And in this case, this difference as to petition, traverse, and *monstrans de droit* was resolved: in all cases at the common law, when the King's title accrues to him by a judicial record, or as Gascoigne, 9 H. 4. says, by judgment of record, there, although the King grants all his estate over, yet the party grieved was put to his petition, and should have *scire facias* against the patentee, as in case of attainder, recovery, &c. 44 E. 3. 22. 10 H. 6. 15. 21 H. 7. 2. 3 Mar. 139. 7 H. 4. 21. But where the King was entitled by conveyance of record, as if a disseisor conveyed the land to the King by fine, deed enrolled, or other matter of record, there although the party was put to his petition against the King; yet if he granted the land over, the disseisee, or he who had right, might (b) enter, or have his action against the patentee; for a judicial record is preferred always before a conveyance of record by assent, as has been said; *vide* 9 H. 4. 4. by Gascoigne the same difference, 25 E. 3. 48. a. Plowd. Com. 553. 22 E. 3. 7. 11 H. 4. 67. 7 R. 2. (c) *Aide del Roy* 61. by which books, if they are well considered, this difference appears. Also in all cases, when the party grieved might have *monstrans de droit*, or traverse against the King, there if the King granted over the land, the party grieved might enter or have his action against the patentee, Stamf. Prærog. 75. a. *vide* 4 E. 4. 22. 3 Mar. Dyer 139.

Nota reader, in Communi Banco inter Pemberton & Barham, Paschæ 32 Eliz. Rot. 235. and in the King's Bench, Hil. 42 Eliz. in a writ of error, between Bereblocke and Read, it was resolved, that if A. is bound in a recognizance, or statute-merchant, or staple; and afterwards a recovery is had against A. in an action of debt, and A. makes his executors and dies, his executors are bound by the law to pay the debt due upon the recovery, altho it be puisne, before the debt due by
recog-

(a) Antea 57. a.
 Stamf. Prærog.
 70. b. 1 Co. 42. b.
 52. b. Moor 416.
 4 Inst. 225.
 Kelw. 173. a.
 Ley de Gards &
 Liveries 25.

(b) Kelw. 91.
 pl. 17.
 2 And. 113, 114.

(c) 2 Co. 53. a.
 Co. Lit. 354. b.

5 Co. 29. a.
 1 Roll. 926.
 Swinb. 369, 370.
 2 And. 160.
 Yelv. 29. Cr. El.
 734, 735, 822.
 2 Brownl. 39, 81,
 82. Co. Ent. 152.
 3 Leon. 270.

recognizance, or statute, because although both are records, yet the judgment in the King's court upon judicial and ordinary proceeding is more notorious and conspicuous, and of more high and eminent degree than a statute or recognizance taken in private, and by consent of the parties, and therefore preferred in judgment of law before a recognizance or statute, which agrees with the reason of the resolution in this case: and I thought this case necessary to be reported, for by this the reader shall understand what was the common law before any statute made concerning this matter, and what cases are remedied by the said statutes of 34 & 36 E. 3. and hereby you will better apprehend the true intention and purview of the statute of 2 E. 6. cap. 8. concerning these matters.

6 Co. 45. b.

34 E. 3. cap. 14.

36 E. 3. cap. 13.

[See 3 Blackf. Com. ch. 17. concerning the subject matter of this case.]

 FORSE and HEMBLING's Case.

Mich. 30 & 31 Eliz.

In the Common Pleas.

1 And. 181, 182.
 Gould. 109, 110.
 Swinb. 439.
 Hard. 375.
 Palm. 384.
 Lane 74.
 2 Roll. Rep. 372.
 5 Co. 10. a. b.
 Fitzgib. 227.

FORSE brought *ejectione firmæ* against Hembling on a wife made by Thomas Calie to the plaintiff for three years, of certain houses in Norwich, from the feast of St. Michael, *anno* 29 Eliz. &c. to which the defendant pleaded not-guilty; and the jury gave a special verdict, *sc.* that one Alice Allen was seised of the said houses in fee, and made her will in writing, and thereby devised that if James Amynde survived her, that then she devised and bequeathed to him and his heirs the tenements in question, and afterwards she intermarried with the said James Amynde; and further found, that she oftentimes after the marriage, revoked the said will, saying, that the said James Amynde should not have the said tenements by the said will, and afterward the wife died seised without issue, and the husband survived, and thereof enfeoffed the defendant, upon whom the said Thomas Calie as heir to the said Alice, entered and made the lease as in the declaration, and prayed the advice of the court. Upon which verdict two questions were moved. 1. If the will of a woman by the intermarriage with the devisee was countermanded, or not. 2. If it was not countermanded by the intermarriage, if by her words of revocation after the marriage it was countermanded. And it was objected by the husband's counsel, 1. That if a feme sole make her will, and devises her land to A. and afterwards marries B. and afterwards B. dies, and the wife survives him, in that case it was said that the will remains good, and was not countermanded by the marriage, as Manwood said in Plow. Com. 343. and was not denied; but if it was admitted that the will in such case was countermanded by the marriage with a stranger; yet in the case at bar for the benefit of the husband being the devisee, the will shall not be countermanded and therefor it is adjudged in 2 (a) R. 2. Attornment

(a) Goldsb. 109,
 110.
 Bridgm. 83.]

ment 8. that where a feme sole makes a lease for life rendering rent, and afterwards by her deed grants the reversion to another, and afterwards and before attornment marries with the grantee, that this marriage was not a countermand (a) of the attornment, as if she had married with a stranger, for it is for the benefit of the husband that it shall not be a countermand, and therefore there by the payment of the rent by the tenant to the husband in the name of attornment, the reversion passed out of the wife to the husband; for the same reason which proves that the intermarriage with a stranger shall be a countermand of the attornment for the benefit of the husband proves that when the grantor marries with the grantee, that it shall not be a countermand, for that shall be for the benefit of the husband. And so in the principal case it is for the benefit of the husband, that the will by the marriage shall not be countermanded, but shall take effect according to the purport thereof: and it was said, that the case of a will when the woman marries with a stranger is not like the case of attornment when the grantor marries with a stranger; for the will of a woman cannot take any effect during her life, but only after her death, and can by no possibility be any prejudice to the husband: for if he has issue he shall be tenant by the courtesy, and he may take the profit thereof during the coverture, or dispose of them at his pleasure to all intents and purposes, as if no will had been made. 2. To say as it is said in 3 E. 3. Devise 12. that the will (b) of a feme covert is void, because the law presumes that it was made by coercion of the husband that cannot be so intended in this case, forasmuch as in the case of 3 E. 3. the will was made by a woman when she was covert, which cannot be made good by any custom: but here in our case the woman was sole, and free from all constraint at the time of the making of her will. 3. It was objected, that if the will was not countermanded by the intermarriage, without question it was not nor could be countermanded by the woman's words after the marriage, for after marriage the whole will of the wife is in judgment of law subject to the will of the husband, and as is commonly said, a feme covert has not any will; and therefore if the will stands notwithstanding the intermarriage, her countermand afterwards is of no force or effect, *quod fuit concessum per tot' curiam* as to this point: further it was objected, that notwithstanding that after the marriage the wife could not revoke her will, so that now after the marriage it is irrevocable, yet that is no reason that the intermarriage should be a countermand; for if a man of sound (c) memory makes his will, and afterwards becomes *non compos mentis*; in that case until the time of his death, after that he became of nonsane memory, he cannot countermand his will, and yet the disability or imperfection of nonsane memory, was not any countermand of it. 4. It was said that

(a) 1 And. 181.
Co. Lit. 310. a. b.
Goldsb. 110.
1 Vent. 186.
1 Roll. 299.
Kelw. 163. a.
Cr. El. 270.
1 Mod. Rep. 91.
11 H. 7. 19. b.

(b) Gobd. 15.
Mo. 123.
Goldsb. 109, 110.
Co. Lit. 112. b.
Br. Devise 34. ver.
N. B. 86. b.
1 Sid. 17.
Antea 51. b.
24 & 25 H. 8.
cap. 5.
Plowd. 344. a.
Perk. sect. 501,
502.
Br. Test 9, 13, 21.
Dy. 143. pl. 56,
354. pl. 34.
18 E. 4. 11. b. 12. a.
Br. Conf. 28.
Swinb. 56, 57.
3 Leon. 81, 82, 83.
4 Leon. 148.
Godb. 143, 144.
2 Brown. 218.

(c) 1 And. 181.
Goldsb. 109.

(a) 5 Co. 10. a.
1 Jones 388.
1 And. 181, 182.
(b) 3 Co. 29. b.
32. a. 34. 2.
6 Co. 76. a.
(c) Co. Lit. 112.
b.
(d) 1 And. 182.
Goldsb. 110.
8 Co. 82. a.
March Arbit.
165. Bacon's
Max. reg. 19.

(e) 1 Sid. 17.
Antea 61. a.
3 E. 3.
Demise 12.

(f) 1 And. 181.
Co. Lit. 310. a.
b. Goldsb. 110.
1 Vent. 186.
1 Roll. 399.
Kelw. 163. a.
Cr. El. 270.
1 Mod Rep. 91.
Bridgm. 83.
11 H. 7. 19. b.

that countermands of wills are not favoured in law; and therefore forasmuch as there is no book in law in this point, but the said case of attornment adjudged is all one in reason with this case; for these causes it was concluded, that judgment should be given against the plaintiff: but it was upon great deliberation adjudged for the plaintiff. And in this case it was unanimously agreed upon the whole matter, *sc.* by the taking of husband, and coverture at the time of her death, the will was (a) countermanded, and that for two reasons.

1. The making of a will is but the inception of it, and it doth not take any effect till the death of the deviser, for *omne (b) testament' morte consummat' est*; & (c) *voluntas est ambulatoria usque extremum vitæ exitum*: then it would be against the nature of a will to be so absolute, (d) that he who makes it, being of good and perfect memory, cannot countermand it: and therefore this taking of husband being in the case at bar her proper act, shall amount to a countermand in law. But when a man of sound memory makes his will, and afterwards, by the visitation of God, becomes of unsound memory (as every man for the most part before his death is) God forbid that this act of God should be in law a revocation of his will, which he made when he was of good and perfect memory. 2. It would be mischievous to women, that after their intermarriages, they could not for no cause countermand their wills. 3. As the law will not allow any custom, that a feme covert may make any devise for the presumption that the law has, that it will be made by constraint of the husband, as it is adjudged in (e) 3 E. 3. So if it was in the power of the wife after her marriage to revoke her will, the law would not suffer the continuance thereof after marriage, forasmuch as the husband by constraint may cause her against her will to revoke or continue it. And as to the said case of (f) attornment, it was said in 2 R. 2. that when the woman in the same case by her deed sealed and delivered by her, granted the reversion to another, it took such effect against herself, that she herself could not by any words countermand it before or after the taking husband, and therefore it is not like the case of a will, because it might well be, that inasmuch as her grant by deed stood in force after the taking of the grantee to husband, that it shall not be any countermand.

[See 2 Cro. 640. That the wife's receipt or acquittal after marriage, for the rent of her own land, shall be no discharge against the husband, though the tenant had no notice of the marriage.]

[See also Cro. Jac. 49. Cooke and Bullock's Case.]

HERLA-

HERLAKENDEN's Cafe.

Pasch. 31 Eliz.

In the King's Bench.

ROBERT IVY brought an action of trespass against Roger Herlakenden, Esq. for breaking his close, *sc.* 380 acres parcel of Colme Park in Colme in the county of Essex, and cutting down 300 oaks, 300 ashes, 300 maples, and 100 beeches there growing, and carrying away 1000 load of wood and underwood, &c. and the defendant, as to the whole trespass, *præter fractionem clausorum, necnon præter succisionem 200 quercuum, 10 fraxinorum, & 10 acer' parcel, &c.* pleaded not guilty; *et quoad fractionem clausorum præd' ac herbæ prædictæ pedibus ambuland' conculcat', & consumption'*; the defendant pleaded the matter in law which follows, by which he entitled himself to the same land, and justified the cutting of the trees, but in the *quoad, &c.* (as appears before) the trespass, as to the trees, was utterly omitted, and so in law nothing pleaded thereto; and then the demurrer being joined, the whole is discontinued, as it is agreed in 7 H. 6. 27. a. *Vide* 27 H. 8. 1. & Dyer 9 Eliz. 264. 7 E. 4. 24. b. & 10. 7 H. 6. 5. a. And therefore to the intent the matter in law might appear, by assent the defendant's plea was amended. For it was agreed, *per totam curiam*, that all was (a) discontinued, and thereupon the roll was amended: *et quoad succisionem arborum, &c.* was inserted. And the matter in law in effect, was such, Edward Earl of Oxford was seised of Colme Park in Essex, in fee, and 17 Eliz. leased to Tho. Barefoot, Tho. Luter and John Collins, the said park (except the trees in the declaration mentioned) for 21 years; John Collins assigned his interest to Anthony Luter, and afterwards the Earl sold to the said Barefoot, Luter and Luter the trees aforesaid, who 15 *Julii, anno* 25 Eliz. leased the said 380 acres

11 Co. 52. 2.
Carthew. 139.

(a) 1 Roll. 487,
488.
1 Roll. Rep.
176, 177.
11 Co. 7. a.
2 Bulstr. 335.
1 Brownl. 192.
228.
Cr. Jac. 353.
Yelv. 6.

See 11 Co. 57.
Lilord's case.

(a) 5 Co. 76. b.
11 Co. 48. b.
81. b. Cro. Car.
242, 274.
2 Roll. 119.
1 Roll. Rep 181.
O. Benl. 113.
Palm. 327.
Mo. 19.
10 H. 7. 2. b.

(b) 5 Co. 13. b.
6 Co. 43. a.
11 Co. 81. b.
Cr. El. 777.
2 Inst. 299.
Sta. Glouc. cap. 5.
Dr. & Stud. 60. a.
(c) Dr. & Stud.
60. a.
(d) 11 Co. 47. a.
48. b.
Cro. Car. 274.
Mo. 9.
Palm. 328.
Br. Done & Re-
mainder 13.
1 Roll. Rep. 97.

acres of land and pasture, parcel of the park aforesaid (upon which the trees aforesaid grew) to one John Bragge for 11 years; and afterwards in August 26 Eliz. Barefoot, Luter and Luter sold the said trees to the defendant; and afterwards, 27 Eliz. Bragge assigned his interest to the plaintiff, and afterwards the defendant cut down the trees, and if this cutting down was lawful or not, was the question. And the point was, when a man leases his land for years; excepting the wood, and afterwards the lessor grants the wood to the lessee, if now the wood is so united again to the land, that by the lease of the land the wood shall pass as a thing annexed to it, or if the wood remains as an interest distinct and severed from the land, so that by the lease of the land it shall not pass to the lessee; and in this case divers points were resolved: 1. When a man makes a lease for life or years, the lessee has but a special interest or property in the (a) trees, being timber, as things annexed to the land, so long as they are annexed to it: but if the lessee, or any other severs them from the land, the property and interest of the lessee is thereby determined, and the lessor may take them as things which were parcel of his inheritance, and in which the interest of the lessee is determined. In an action of waste for cutting down of trees against lessee for life or years, the writ saith *ad exharedationem*, and it would be absurd that the lessee, who has but a particular interest in the land, should have an absolute property in any thing which was parcel of the inheritance: at the common law, if tenant in dower, or tenant by the curtesy cut down trees, he in reversion might take them, yet their estate is as high as lessee for life: but the lessor should not have an action of waste at the common law against the (b) lessee, because it was his own act, and it was his folly to make a lease to him who ought to do him fealty, and yet will commit waste: it was also his (c) folly, that in his lease he would not provide by condition or covenant, that he should not commit waste, or to prevent it by exception. If I lease my land for life, (d) and afterwards give the trees, and afterwards the lessee dies, yet the donee cannot take them, as it is held *per totam curiam* in 21 H. 6. 46. b. because at the time of the gift the lessee had the property in them as annexed to the land. And Sir Christopher Wray, C. J. said, a case between Moyle Finch, Esq. and Madam Finch his mother, was now lately referred to him and Sir Roger Manwood, Chief Baron, which in effect was, that Madam Finch had an estate for life in certain land without impeachment of waste, and the said M. had the inheritance expectant, Madam Finch cut down divers trees growing upon the

the said land: the question was, if the said Moyle might lawfully take the said trees, or if they of right belonged to his mother; and upon conference had with divers other Justices, they resolved, 1. That if the said estate had been made for life, without any such clause of without impeachment of waste, that without question the said M. should have the trees, because they were parcel of his inheritance, and that the interest which the tenant for life had in the trees, was by the severance from the land determined, because she had them as things annexed to the land. 2. In the same case it was resolved, that the said clause of without (a) impeachment of waste gave the tenant for life no greater interest in the trees than she had by the demise of the land; but it should serve only that she should not be impeached in any action of waste, either to recover damages, or the place wasted; as if I grant to one that he shall not be impeached for cutting of all my trees in such woods, it shall excuse him in any action brought against him for the cutting, but notwithstanding *that* the property and interest remains in me, for no property or interest is thereby given him. So if a man disseises me of my land, or dispossesses me of my goods, and I (b) release to him all actions, yet I may enter into my land, or take my goods, for the discharge of my action is no bar of my right; and therewith agrees Lit. cap. Releases 115. and all this was said and reported by the said Sir Ch. Wray. *Vide* 27 (c) H. 6 Wast. 8. where it is said, if a man leases land *absque impetitione vasti*, and a stranger cuts down trees, and the lessee brings an action of trespass, he shall not recover damages for the value of the trees, because the property is to him in the reversion, wherefore the lessee shall recover but for the cropping and breaking of the close; and it was said, that if tenant in tail, after possibility of issue extinct, sells the trees, the lessor shall have them; for inasmuch as he has but a particular estate for life in the land, he cannot have an absolute interest in the trees, but he shall not be punished in (d) waste, because his original estate is not within the stat. of Gloucester, cap. 5. 2. It was resolved, that if the house falls by tempest, (e) or other act of God, the lessee for life, or lessee for years, has a special interest to take the timber to build the house again if he will for his habitation: but if the lessee (f) pulls down the house, the lessor may take the timber as a thing which was parcel of his inheritance, and in which the interest of the lessee is determined, as in case of trees, and for the same reason; and notwithstanding he may have an action of waste, and recover treble damages. *Vide* 44 E. 3. 5, & 6, & 44. 29 E. 3. 42. 2 H. 7. 14. *per* Brian. 10 H. 7. 2. 13 H. 7. 9. 21 E. 4. 52. 1 Mar. Dyer 90. 2 Eliz. Dy. (184.) 194. 3. It was resolved, that if (g) trees

being

- (a) 11 Co. 63. a.
82. b. 83 Co.
Lit. 220. a.
a Co. 9. a. cont.
Dyer 184. pl.
63. 1 Roll. Rep.
182, 183.
2 Roll Rep. 325.
2 Roll. 835.
Co. Lit. 220.
Hob. 132.
Lath. 269, 270.
2 Inst. 146.
Moor 18, 317,
327.
2 Co. 23. a. 72. a.
Poph. 193, 194.
195.
Dyer 47. pl. 11.
Bridgm. 102.
Plowd. 135. b.
Cro. Jac. 216.
Hedl. 77.
(b) 8 Co. 152. a.
Co. Lit. 286. a.
b. Lit. sect. 496.
(c) Dyer 184.
pl. 63.
1 Roll. Rep. 183.
11 Co. 83. a.
4 Leon. 143.
Poph. 194.
Moor 321.
(d) 6 Co. 41. a.
9 Co. 139. a.
11 Co. 80. a.
Co. Li. 27. b.
1 Roll. Rep. 100,
179. 184.
F. N. B. 59. P.
39 E. 3. 10. a. b.
Dr. & Stud. lib.
2. cap. 7.
Lit. sect. 24.
12 H. 4 3. b. 4. a.
10 H. 6. 1. b.
45 E. 3. 25. a.
18 E. 3. 32. b.
11 H. 4 14. b.
15. a.
11 H. 6. 1. b.
2 Roll. 826, 828.
West. Symb.
180. b.
2 Inst. 302, 306.
(e) 11 Co. 81.
82. a.
1 Roll Rep. 181.
Co. Lit. 53. b.
(f) Postea 87. a.
(g) 11 Co. 61. b.

- (a) 11 Co. 81. b. being timber are blown down by the wind, the (a) lessor shall have them (for they were parcel of his inheritance) and not the tenant for life or tenant for years: but if they be dotards without any timber in them; the tenant for life or tenant for years shall have them. *Vide* 40 Aff. 22. that guardian (b) in chivalry shall not have windfalls; and so the *quære* in 7 H. 6. 38. well satisfied. 4. Point was, when the Earl leased the land for years, excepting the trees, by which they were severed from the possession of the land during the term, then after the lessor granted the trees to the lessee, if now they be re-united to the possession of the land, so that when the term ended the lessor should have them again as things annexed to the land. And it was resolved, that the lessee had in judgment of law an absolute and divided property in the trees, (c) so that by the lease of the land they should not pass, and therefore this difference was taken: if I enfeoff you of my land (except the trees) to have and to hold to you and your heirs, now the trees in property are divided from the land, although; *in facto* they remain annexed to the land, for if one cuts them down and carries them away it is not (d) felony: and therefore in such case, if the feoffor grants the trees to the feoffee, they are re-united as well in property as they are *de facto*, and the heir of the feoffee shall have them, and not the executors, for the feoffee had absolute ownership in both, so that it is not any prejudice but rather a benefit to him that they are re-united to the land. But in the case at bar he had but a term for years in the land, so that he had not equality in ownership in both, and it would be a prejudice to him, that during the term he could not sell them, but should be punished in waste, and after the term should lose them, and it would be (e) against reason that the lessor should against his own grant have them again. It was also said, that Barefoot, Luter and Luter were tenants in common of the land, and they were joint-tenants of the trees, and so their interest divers and of several qualities, therefore there could not be an union between them. Nich. Fuller and Tanfield were of counsel with the plaintiff, and Egerton the Queen's Solicitor and Coke with the defendant.
- Nota* reader, Mich 18 & 19 Devon'; it was adjudged in C. B. that waste might be committed in (f) glass annexed to windows, for it is parcel of the house, and shall descend as parcel of the inheritance to the heir, and that the executors should not have them; and although the lessee himself at his own costs put the glass in the windows, yet in being once parcel of the house he could not take it away, or waste it, but he should be punished in waste; and upon the said judgment a writ of error was brought in B. R. and there the judgment was affirmed. *Nota* also, *inter Warner & Fleetwood, Mich. 41 & 42 Eliz.* in C. B. it was resolved *per totam curiam*; that glass

(a) 11 Co. 81. b.
Moor 317.

(b) Ley 74.

(c) Goldsb. 183.
11 Co. 50. a.
Owen. 49.
Cro. Jac. 458,
459.
Cro. El. 522.
1 Roll. Rep. 101.
(d) 2 Brownl.
196.

(e) Hob. 173.

(f) Moor 178.
Swinb. 132, 345.
Co. Lit. 53. a.

glafs annexed to windows by nails, or in other manner, by the leffor or by the leffee, could not be removed by the leffee, for without glafs it is no perfect house; and by lease or grant of the house it should pass as parcel thereof, and that the heir should have it, and not the executors; and peradventure great part of the costs of the house consists of glafs which if they be open to tempests and rain, waste and putrefaction of the timber of the house would follow, which agrees with the judgments given before. It was likewise then resolved, that wainscot, be it annexed to the house by the leffor or by the leffee, is parcel of the house; and there is no difference in law if it be fastened by great nails or little nails, or by screws, or irons put through the posts or walls (as have been invented of late time;) but if the wainscot is by any of the said ways, or by any other, fastened to the posts or walls of the house, the leffee cannot remove it, but he is punishable in an action of waste, for it is parcel of the house; and so by the lease or grant of the house, (in the same manner as the ceiling and plaistering of the house) it shall pass as parcel of it.

Co. Lit. 53. 2.
1 Rol. Rep. 216.
Swinb. 346, 132.
Owen 70, 71.
20 H. 7. 13. b.
Moor 177, 178.

F U L W O O D's Case.

Hil. 33 Eliz.

In the King's Bench.

See Cumb. 78.
3 Cases in Law
and Equity 289.
Lucas 289.

BETWEEN Cartwright, plaintiff, and Roberts defendant, in *ejectione firmæ* of houses in London, upon a demise made by Sarah Sharrington, &c. Upon not guilty pleaded, the jury gave a special verdict to this effect: T. Castle was seised of the houses aforesaid, and *primo* Eliz. took a wife, and afterwards 1 Eliz. before the Mayor and Aldermen of London, acknowledged a recognizance of 250l. to the Chamberlain of the city of London and his successors, according to the custom for orphanage money; and afterwards, *sc.* 8 El. the said Castle came before the Recorder of London and Mayor of the Staple, and acknowledged *se debere* 200l. to Sir Thomas Rivet; and afterwards *anno* 10 El. Sir Thomas Rivet sued execution upon the said flat. and had a *liberate*; upon which the Sheriff delivered the said houses, amongst others, to the said Sir Thomas (but it did not appear that the *liberate* was returned:) and afterwards the successors of the said Chamberlain sued execution in London by a precept, in nature of an *Elegit*, directed to one Flick, Serjeant of the Mace, and officer of the said court, who by force thereof delivered the said houses among others, for one moiety, to the Chamberlain aforesaid; and afterwards Tho. Castle died, and after his death his wife recovered dower, and had the said houses assigned her for her third part to hold in dower, and she died in *anno* 18 El. and afterwards the said Chamberlain assigned over his interest to one Fulwood, and afterwards 21 Eliz. Sir T. assigned over his interest to the said Fulwood also: *anno* 29 Eliz. the heir of the said Castle, demised to Guilbert Sharrington the said houses for years, who demised to the lessor of the plaintiff, upon whom the defend. by title derived from the said Fulwood entered, &c. and if the entry of the defendant was lawful or not, was the question. And in this case eight points were unanimously resolved by Sir Christopher

Wray

Wray Chief Justice, and the whole court. 1. That whereas it was objected that in case of a sole corporation or body politic, be it created by charter or prescription, as Bishop, Parson, Vicar, Master of an hospital, &c. no (a) chattel, either in action or in possession, shall go in succession, but the executors or administrators of the Bishop, Parson, &c. shall have them, no more than the heir of a private man can have them; for succession in a body politic is inheritance in case of a body private. But otherwise it is in case of a corporation (b) aggregate of many, as Dean and Chapter, Mayor and Commonalty, and the like, for there, they in judgment of law never die. And all this was affirmed *per tot' curiam*, 8 E. 4. 18. & 20 E. 4. 2. a. Wherefore it was concluded, that the Chamberlain of London being a sole corporation, that his successor could not have the said recognizance acknowledged to his predecessor; yet it was resolved, that the (c) successor should have it, for in this case the corporation of the Chamberlain was by custom, and the same custom which has created and made him a corporation in succession as to this special purpose concerning orphanage, has enabled his successor to take such recognisances, obligations, &c. which are made to his predecessor, and such custom is grounded upon great reason; for the executors or administrators of the Chamberlain ought not to intermeddle with such recognisances, obligations, &c. which by the said custom, are taken in the corporate capacity of the Chamberlain, and not in his private capacity: but a Bishop, Parson, &c. or any sole corporation which are bodies politic by prescription, cannot take a recognizance or obligation but only to their private, and not in their politic capacity, for there wants such custom (as in the case at bar) to take a chattel in their politic or corporate capacity. 2. It was objected, that where the statute of W. 2. cap. 18. which gives the (d) *elegit*, provides, *Quod de cætero sit in electione illius, &c. quod vicecomes liberet ei omnia catalla, &c. & medietatem terræ suæ, quousque debitum fuerit levatum per rationabile pretium & extentum, &c.* That because the statute gives power expressly to the Sheriff to execute the *Elegit* by reasonable extent, which is to be intended by (e) inquisition of honest men, and forasmuch as the Sheriff is a great officer and sworn, &c. that the said act by any strained construction shall not be extended to a Serjeant at Mace (who is not sworn) to take a jury, &c. and thereupon the books in 7 H. 6. 35. 14 E. 2. Redisseisin 9. & 32 H. 6. 25. were cited, that an action of waste nor redisseisin doth not lie in (f) ancient demesne, because the enquiry of waste, and the proceeding in redisseisin is appointed by the statutes to be made by the Sheriff, and in

(a) 1 Roll. 515.
Hob. 64. 12 Co.
105. Co. Lit. 9. a.
46. b. 90. a. Br.
Corporation 60.
20 E. 2. 4. a.
Dyer 48. pl. 15.

(b) Dyer 48. pl.
15. 27 H. 3.
15. a.

(c) Cr. Eliz. 1
464. 682.
1 Roll. 515.
Cr. Jac. 159.]

Co. Lit. 46. b.

(d) 2 Inst. 394,
395.

(e) Postea 67. a.
74. b. 2 Inst. 396.
Cr. Jac. 560.
Dyer 100. pl. 71.
2 Bulstr. 97. Cr.
El. 584. Dall.
28. pl. 1.

(f) 2 Sand. 254.
Owen 24. 1 Roll.
323. Duct pl. 52.

(a) Cr. Car. 319.
Hob. 83.

(b) 2 Inst. 390.
Dy. 204 pl. 1.

(c) 10 H. 7. 28. a.

(d) Cr. Jac. 478.
2 Roll. 473.
5 Co. 90.

(e) Hob. 55.
2 Roll. 700.
Cr. Car. 363.
2 Vent. 3.
Raym. 150.
Vaugh. 102.

(f) Hard. 413.
Hob. 55, 56, 202.
2 Roll. 700.
Raym. 150.
Lane 40. 1 Si-
derf. 27. 3 Co.
2 a. Cr. Car. 363.
Vaugh. 102.

ancient demesne there is not any Sheriff, and the Bailiff who is officer in ancient demesne shall not supply the place of the Sheriff. But it was resolved by the whole court, that the execution was well enough, for the statute which provides, that process shall be made to the Sheriff, by equity is to be extended to every (a) other immediate officer to every court of record of the King, and *eo potius*, because the statute of W. 2. cap. 18. couples the *Elegit*, with the *Fieri facias*, and limits both to be executed by the Sheriff; and yet without question the Sergeant at Mace in the case at bar may execute a *Fieri facias*: and it is not like the case of waste, for the statute of W. 2. cap. 14. provides that in (b) *propria persona accedat ad locum vastatum*; so that the personal appearance of the Sheriff is requisite, and in the case of redisseisin the Sheriff is (c) Judge, and therefore not like. 3. Where it was further objected, that the execution upon the *Elegit* was not lawful, forasmuch as Sir Tho. Rivett was in by matter of record whereof he ought to take notice, and to have sued *Scire facias* against him, in proof of which the books in 9 E. 3. or 4. 24 & 2 R. 3. 8. Simpson's case, were recited. But it was resolved *per tot' curiam*, that the execution upon the *Elegit* was good enough: but it was said, if the Sheriff had returned the former by extent, and the matter had appeared to the court, the plaintiff (d) ought to have had a *Scire facias*; but the whole court said, if the Sheriff levies execution it is good enough, *vide* for that 22 E. 3. 7. 4thly, It was objected, that here was no statute or recognizance in nature of a statute sufficiently found, for the jurors have found, that the said Tho. Castle *veniebat coram R. O. Recordatore civitatis London. & Tho. O. majore stapulæ, & recognovit se debere Tho. Rivet, militi, 200l.* and doth not say, *secundum formam (e) statuti, &c. nec per scriptum obligatorium, &c.* where the statute of 23 H. 8. provides that it shall be by bill obligatory, sealed with 3 seals. But it does not appear by the verdict, that there was any bond or any seal, neither doth it appear by any word of the verdict, that it was made according to the stat. &c. And it was said, that although verdicts being the words of lay men shall be taken according to their meaning, and there need not so precise form in them as in pleading, yet the substance of the matter ought to appear either by express words, or by words equipollent, or tantamount, so that there ought to be convenient certainty, which if it be false, the party for such falsity may have his attain: but it was resolved, that the (f) verdict is good enough; for inasmuch as they have found a recognizance before the Mayor and Recorder, &c. it should in a verdict of laymen be intended according to the statute, for otherwise they could not take any recog. and also the whole sequel of the verdict implies that this was a recognizance in the nature of a statute, or

or otherwise no execution could be sued thereupon in the Chancery. 5. It was objected, when the wife of the conusor recovered dower, and thereby the possession of the conusee was evicted, and also when a greater term in the moiety was evicted by force of the *Elegit* than the conusee had; for (for example) the extent upon the stat. if no eviction had been incurred in 13 years, and the moiety which was evicted by the *Elegit* would be subject to execution by force of the *Elegit* for 15 years; so that a greater term was evicted by *Elegit*, and a greater estate was recovered by the writ of dower than the conusee had, and therefore he should be put to his *Scire facias* upon the statute of 32 H. 8. cap. 5. (a) for otherwise great mischief would ensue; for if the conusee should hold over, after the death of the tenant in dower, and after the extent upon the *Elegit* incurred, then, during the life of the tenant in dower, and during the execution upon the *Elegit*, the conusee might sue a new execution upon the said statute, and so have double remedy, which never was the intention of the statute. But it was resolved *per totam curiam*, that in this case the conusee could not have any help of the said statute, for inasmuch as but part was evicted, *scil.* the moiety upon the *Elegit*, the conusee should not only hold over the other moiety, but also after the death of the tenant in dower, and the extent upon the *Elegit* ended, he should re-enter into the said land so evicted, and therefore he is not helped by the said act, for the said act will not help but when the conusee is put clearly without remedy to obtain any part of his debt: as where the whole execution is avoided by title paramount for ever. And that appears by the express words of the preamble, for the words of the preamble are; "by reason whereof the obligees, recognisees and recoverors have been thereby set clearly without remedy by any manner of suit of law." And the body of the act refers to the preamble, *scil.* "such lands, &c." In the body of the act it is said, "any such lands, tenements or hereditaments, as be or shall be had or delivered in extent," and doth not say, "or any part thereof:" and it is provided that new execution shall be done: "for the levying of the residue of all such debt and damage as then shall appear to be unlevied, &c." And that cannot be when but parcel of the land extended is evicted, for by the common law the conusee in such case is not without remedy, but the conusee shall hold the residue of the land over, till the residue of the debt shall be satisfied; and therefore, if he should have his remedy also upon the said statute, he would have double satisfaction, which would be inconvenient: and if the conusee has remedy either *in presenti* for part, or *in futuro* for all, or part, the said act of 32 H. 8. doth not extend to it. 6. It was objected that when Sir T. had execut. (for example) of 4 houses, and the extent of that by course of time would endure for 13 years and afterwards 2 of the said houses are evicted by *Elegit* for 15 years,

(a) 2 Inst. 677.
678, 679, 680.
Co. Lit. 289. b.
290.

Co. Lit. 289. b.
Cr. Jac. 694.

Co. Lit. 289. b.
5 Co. 87. a.
See Skinner 263.

Co. Lit. 289. b.

Co. Lit. 289. b.

years, and afterwards Sir T. Rivet assigned over all his interest in the execution upon the statute to Fulwood, that this assignment as to the two houses so evicted was void, for in that a greater term was evicted than the conusee had for the moiety, and then, at most, the conusee had but a possibility which could not be assigned over. And a case adjudged now lately in C. B. was cited, which was such in effect; a man possessed of a term for divers years, devised the profits thereof to for one life, and after his decease to another for the residue of the years, and died; the first devisee entered by the assent of the executor, and afterwards he in the remainder during the life of the first devisee assigned it to another, and afterwards the first devisee died; it was adjudged that the assignment was void, for he in remainder had but (a) possibility during the life of the first devisee; for it is as much in law, as if the land had been devised to him for so many of the years as he should live, or for the whole term if he should live so long, so that the interest of the term *sub modo* is in him, and the other in remainder has but a possibility which he cannot grant over: but it was resolved, that in the case at bar, the conusee had an interest in the two houses which were evicted, for it was agreed by them, if a man is bound in two statutes, and the latter statute is (b) first extended and delivered in execution, and afterwards the first statute is put in execution for greater time, and for a greater sum than the first was, yet when the first statute is satisfied, and his interest lawfully determined, the 2d conusee shall have the land again by force of the first extent; and so in the case at bar, when a moiety was evicted for 15 years by force of the *Elegit*, now by computation the conusee of the stat. shall hold the other moiety for 15 years, and after the 15 years expired, the whole land, until the whole debt upon the stat. is satisfied: so that it is not a possibility, nor so uncertain, but that by computation it may be by reasonable intendment made certain: *et id (c) certum est, quod certum reddi potest*: and although casualties and sudden accidents may happen, yet *casus fortuitus non est sperandus, & (e) nemo tenetur divinare*. It was also resolved, that if the conusee is ousted by wrong by the conusor, or any other who has the immediate estate, that the conusee shall hold (f) over. So when the wife (g) of the conusee recovered dower, the conusee shall hold over, for she claimed by her husband: the same law if a man makes a lease for life or for years, and (b) afterwards disseises his lessee for life, or ousts his lessee for years, and acknowledges a stat. or recognizance, upon which execution is sued, and afterw. the lessee for life enters and dies, or the years expire, the conusor shall re-enter and hold over; and such eviction for a time is not within the said act of 32 H. 8. because the conusee has remedy *in futuro*. 7. It was objected that forasmuch as the *liberate* was not returned,

(a) 10 Co. 47. b.
Carter's case.
2 Brownl. 175.
1 Bulstr. 192.
193. Raym. 146.
Palm. 48. 2 Rolle
Rep. 129. Cr.
Jac. 510. Palm.
274.
1 Co. 153. b.

(b) Palm. 272.

(c) 5 Co. 5. a.
Co. Lit. 45. a.
46. b. 96. a.
142. a. 9 Co.
30. a. 47. a.
Lane 51. Hetly
98. 2 Brownl.
336. 5 Co. 6. a.
(d) Hard. 82.
Lit. Rep. 98.
(e) Antea 28. a.
Lit. Rep. 98.
(f) Co. Lit.
289. b.
(g) Co. Lit.
289. b.
(i) Co. Lit.
289. b.

execution was not lawfully done, for inasmuch as tenant by statute merchant is tenant by matter of record, the *liberate* ought to be returned, or otherwise he will be tenant by matter in fact in *pais*, and not by matter of record. Also the *liberate* ought to be returned, or otherwise the time of the *liberate* made will not appear, and the term of the conusee shall begin from the time of the (a) *liberate* executed, *quod vide* 33 H. 8. tit. Statute 41. 2. It appears by the *liberate* that the conusee shall be satisfied for all his costs and damages, *quæ tunc, sc. tempore* of the delivery of the land to the conusee *sustinuit*, so that the time of the delivery is material and ought to appear of record. 3. If the terre tenant should be driven to sue a *Scire facias* after the extent incurred by course of time, the *liberate* ought to appear of record, so that it might appear to the court that the time is past. 4. It was said, that it would be dangerous to purchasers, for they could not know of the execution by any search, if the execution do not appear of record: but it was resolved *per totam curiam*, that the execution of the *liberate* was well enough, although the writ was not (b) returned, for the writ is not conditional, but has these words, *et qualiter hoc præceptum, &c.* and is stronger than the case of the *capias ad satisfaciendum*, for there are words conditional, and yet the execution is good although the writ is not returned; so of *habere facias seisinam*, and generally of all other writs of execution which are the most final process, and after which no judgment is to be given, nor no farther process had: *vide Paschæ* 13 Eliz. inter Borley & Borley, 17 Aff. 24. 32 E. 3. 101. tit. *Scire fac*, 19 E. 3. *Scire facias* 120. 20 H. 6. 24. 21 H. 6. 5. b. 11 H. 4. 57. b. But it was said that this case was not like the case of *Elegit*, where an (c) inquisition was to be taken, for there the writ ought to be returned, to the intent that the court shall judge upon the sufficiency or insufficiency of that inquisition: but it was agreed clearly, that where no inquest was to be taken, but only land to be delivered, or seisin had, or goods sold, &c. which were but matters in fact, these are good although the writ is not returned: (d) but every inquest taken by the King's writ ought to be of record, and not averable by the country. 8. It was objected that after the extent upon the statute staple incurred by course of time, the conusor might enter, and should not be put to his *Scire facias*; for although the damages and costs are uncertain, yet the judges might adjudge and take knowledge of them, for first the time of the conusans of the statute appears, and for what time the said debt was withheld till the *liberate*, so that they might well judge of the damages and costs; and therefore when by course of time as well the debt

(a) Cr. El. 463.

(b) 1 Leon. Rep.
280. Cr. El. 17.
Moor. 209.
2 Leon. 13.
Godb. 82, 83.
Kelw. 3. a.
Lat. h. 223.
4 Co. 90. a.

(c) Fettes 74. b.
2 Inst. 396. Cr.
Jac. 569. Dyer
100. pl. 71.
2 Bulstr. 97. Cr.
El. 584. Dall. 28.
pl. 1.

(d) 5 Co. 90. a.
Moor 57. Cr.
Jac. 569.

(a) 2 Rolle 483.
2 Inst. 396.
Hard. 82.

2 Sand. 107.

(b) Cr. Car.
598, 599.
2 Rolle 479.
2 Inst. 678, 680.

(c) 2 Roll. 486.

(d) Cr. Car. 598.
2 Rol. 480.
Hard. 80.
2 Inst. 680.
(e) 2 Inst. 678.

as the costs and damages, and greater sum is levied, the conusor might enter: and difference was taken when the extent incurs by effluxion of time, and when by casual profit; for when it is satisfied by casual profit, he ought to have (a) *Scire facias*, but in the other case he may enter. And to this intent the books in 32 E. 3. *Scire facias* 101. 11 H. 6. 7. 9 E. 4. 50. 2 R. 2. Execution. 17. Fitz. 15 H. 7. 15. were cited. *Et vide* 30 H. 6. 1. b. 38 E. 3. 10. 14 H. 4. 9. That in debt the court may assess costs and damages without any enquiry, for the reason aforesaid. But it was resolved "by the whole court," that in the case at bar the conusor could not enter, for the conusee shall hold the land not only until he is satisfied for (b) damages, &c. for the detainer of the debt, and for costs of suit, but also for his reasonable labours and expences, &c. for the entry thereof is, *tenendum ut liberum tenementum, &c. quousque debitum præd' una cum damnis & expensis suis necessariis & rationabilibus, ut in laboribus, sectis, dilationibus, & expensis, &c.* which are uncertain. And forasmuch as they are uncertain, and the conusee in by matter of record, reason requires that the conusor should bring a *Scire facias* against the conusee before that his estate shall be defeated: also the court of (c) Chancery, which awards the extent and *liberate*, shall adjudge of the reasonableness of the costs, damages, labours, expences, &c. as any other court, and it was agreed "by all," that in case of *Elegit*, (d) the conusor after satisfaction had, might enter, for he should not have damages, (e) costs, nor other thing, but only the land until the debt is satisfied; and because all is certain, the conusor, after the extent expired, might enter: *vide* the statute *de mercatoribus* 13 E. 1. the statute of Acton Burnel, and the statute of 27 E. 3. for costs, and damages upon the statute staple. And judgment was given against the plaintiff. William Daniel, James Dalton, and others were of counsel with the plaintiff, and Edward Coke and others with the defendant.

H Y N D E's Case.

4 Co. 68.

Hill. 34 Eliz. Rot. 2380.

In the King's Bench.

Brownlow.

Oxon. ff. **E**LIZABETH HYNDE was summoned to answer to Richard Libb, Esq. of a plea, wherefore, whereas by the common counsel of the realm of the lady the now Queen of England, it is provided, that it shall not be lawful for any one to do waste, spoil, or destruction in lands, houses, woods, or gardens, to him demised for term of life or years, the said E. of lands and woods in Goring and Whitchurch, which she holdeth for term of years, of the demise of Rob. Garrard, of the aforesaid Rich. of the assignment of W. Haw, who thofe to the said Rob. demised, for the said term thereof made to the said Rich. did waste, spoil, and destruction, to the disinherison of him the said Rich. and against the form of the provision aforesaid, &c. And whereupon the said Rich. by Tho. Lane his attorney saith, that whereas the aforesaid, Will. Haw, was seised of a messuage called Haw Place, 200 acres of land, 10 acres of meadow, 100 acres of pasture, and 50 acres of wood, with the appurtenances in Goring and Whitchurch afores. in his demesne as of fee, and so thereof being seised on the 4th day of January, in the 28th year of the reign of the said lady the now Queen at Goring aforesaid, by a certain indenture made between the aforesaid Will. by the name of Will. Haw of Haw Place, in the parish of Goring, in the county of Oxon, Yeoman, of the one part, and the aforesaid Rob. Garrard, by the name of Rob. Garrard of Hedfor in the county of Buckingham, Gent. of the other part, which said other part, sealed with the seal of the aforesaid Rob. the said Rich. brings here into court, whose date is the same day and year, demised to the said Rob. the tenements aforesaid with the appurtenances, except (during the life of Agnes Haw, mother of the said Will.) such part of the messuage aforesaid, parcel of the premises, orchard and garden, one close called Reaves Dean, and one close called Bell Close, and one orchard, called the Orchard Pedell, parcel of the premises, which the said Agnes then occupied, and then had, taken, and agreed, to receive for her dower, of, in, and for the tenements aforesaid with the appurtenances, to have, and to occupy the said tenements with the appurtenances, (except before excepted) to the said Rob. and his assigns, from the Feast of the birth of our Lord God then last past, until the

end

end and term of 16 years, from thence next ensuing, and fully to be complete and ended, by virtue of which demise, the said Rob. entered into the tenements aforesaid with the appurtenances, above in form aforesaid demised, and was thereof possessed, and being so possessed thereof on the 20th day of August, in the 29th year of the reign of the said lady the now Queen, at Goring aforesaid, granted all his estate, interest, and term of years, which he had then to come, of and in the aforesaid tenements with the appurtenances, above in form aforesaid demised, to the aforesaid Eliz. Hynde, by virtue of which grant, the aforesaid Eliz. entered into the said tenements with the appurtenances, above in form aforesaid demised, and was possessed thereof, and the aforesaid Eliz. being so possessed thereof, and the aforesaid Will. Haw, of the reversion thereof in his demesne as of fee, in form aforesaid being seised, the said Will. on the 7th day of March in the 30th year of the reign of the said lady the now Queen, at Goring aforesaid, by his indenture of bargain and sale, made between him the said Will. of the one part, and the aforesaid Rich. of the other part, which other part, sealed with the seal of the said Will. Haw, the said Rich. here brings into court, whose date is the same day and year, and in the court of the said lady the Queen of the Bench here at Westminster, in Easter term, in the said 30th year of the reign of the said lady the Queen above. before the then Justices of the said lady the Queen of the Bench aforesaid here, as the deed of the said Will. Haw, by him the said Will. acknowledged, and within six months then next following, that is to say, the same Easter Term in due manner in the said court of record enrolled, according to the form of the statute in such case made and provided, for and in consideration of 120 l. to the said Will. by the said Rich. before that time paid, bargained, and sold to the said Rich. (amongst other things) the reversion aforesaid to have and to hold to him and his heirs for ever, by virtue of which bargain and sale, and inrolment aforesaid, and by force of a certain statute made in the parliament of the lord Henry the 8th late King of England, holden at Westminster in the county of Middlesex, on the fourth day of February, in the 27th year of his reign, of transferring of uses into possession, the aforesaid Rich. was and yet is seised of the reversion aforesaid, in his demesne as of fee, and the said Rich. being so seised thereof, and the aforesaid Eliz. being possessed of the tenements aforesaid, with the appurtenances, to her in form aforesaid granted, the said Eliz. did waste, spoil, and destruction of the lands, that is to say, in digging in 10 acres of land, in Goring aforesaid, parcel of the tenements aforesaid to the aforesaid Rob. demised, 100 loads of clay, taking for the price of every load of clay thereof 8 pence, and cutting down and felling of the woods, also in a certain wood called Highgrove, containing 10 acres of wood, with the appurtenances in Goring aforesaid, and parcel of the tenements aforesaid with

with the appurtenances, to the said Rob. above in form aforef. demised, 200 oaks, the price of every oak five shillings, through the said whole wood here and there growing, and in a certain other wood called the Hedge Row, lying in Goring aforef. near the aforef. wood called High-grove, in Goring aforef. parcel of the tenements aforef. with the appurtenances demised in form aforef. to the aforef. Rob. 40 oaks, the price of each of them six shillings, through the said whole wood here and there growing, and in a certain coppice, called Home Coppice, in Goring aforef. parcel of the aforef. tenements with the appurtenances demised, to the said Rob. in form aforef. above, 100 oaks, the price of each of them 10 shillings, in the said coppice called Home Coppice, lately growing here and there, and in 20 acres of pasture called the Hanging, in Goring aforef. lying there, betwixt a certain close called High-grove Hill, and another close called Dicker-grove Hill, that is to say, parcel of the tenements aforef. with the appurtenances demised, to the aforef. Rob. in form aforef. 10 oaks, the price of each of them 10 shillings, six ashes, the price of each of them 5 shillings, and 10 beeches, the price of each of them 6 shillings, in the aforef. 20 acres of pasture likewise, late here and there growing, and in a certain hedge of a certain close called Home Field in Whitchurch aforef. that is to say, parcel of the tenements aforef. with the appurtenances demised to the aforef. Rob. in form aforef. lying near unto a wood called Hawes Coppice, 3 oaks, the price of each of them 10 shillings, and one beech, the price 10 shillings, and in a certain other hedge, of the close aforef. called Home Field, in Whitchurch aforef. that is to say, parcel of the tenements aforef. demised to the aforef. Rob. in form aforef. lying near to the aforef. wood called Home Coppice, 10 oaks, the price of each of them 20 shillings and also in suffering the sprouts of the roots of 20000 other little oaks, called Oak Saplings, of 10000 beeches, and 100 ashes, to the value of 20 pounds, in the aforef. wood called the Hedge Row, and 10000 of oaks, 10000 of beeches, and 200 of ashes, in the aforef. coppice called Haw Coppice, by the said Eliz. through the whole woods here and there growing to be cut, and to be eaten and utterly destroyed and wasted with cattle, to the disinherison of the said Rich. and against the form of the provision aforef. : whereupon he saith he is injured, and hath damage to the value of 200 pounds, and thereof he bringeth suit, &c. And the aforef. Eliz. by Ralph Burges her attorney, cometh and defendeth the force and injury, when, &c. and whatsoever, &c. and saith that the aforef. Rich. ought not to have his said action against her, because she saith that well and true it is, that the aforef. Will. Haw, was seised of the tenements aforef. with the appurtenances in his demesne as of fee, and being so seised thereof on the aforef. 4th day of January in the 29th year of the reign of the said lady the now Queen above.

abovesaid, by his indenture aforesaid demised to the aforesaid Rob. the tenements aforesaid with the appurtenances, (except before excepted) to have, and to hold, to him and his assigns, from the aforesaid feast of the Birth of our Lord then last past, until the end and term of the aforesaid 16 years, then next following and fully to be complete and ended. By virtue of which demise, the aforesaid Rob. entered into the tenements aforesaid with the appurtenances, above in form aforesaid demised, and was thereof possessed, and being so possessed thereof, on the aforesaid 20th day of August abovesaid, granted all his estate, interest, and term of years, which he had then to come, of and in the aforesaid premises, with the appurtenances, above demised, to the aforesaid Eliz. Hynde, by virtue of which grant, the aforesaid Eliz. entered into the aforesaid tenements with the appurtenances above demised, and was thereof possessed, as the afores. Rich. by his declaration above supposeth : but the said Eliz. further saith, that the said Eliz. being possessed of the tenements aforesaid with the appurtenances, above demised, in form aforesaid, and the said Will. Haw, being seised of the reversion thereof, in his demesne as of fee, after the aforesaid 7th day of May, in the 30th year aforesaid, and before the aforesaid indenture of bargain and sale, between the afores. Will. of the one part, and the aforesaid Rich. of the other part made, in the court of the lady the Queen of the Bench here in form afores. was enrolled ; a fine was levied in the afores. court of the lady the Queen of the Bench here, that is to say, at Westminster afores. from the afores. day of Easter in 15 days, in the 30th year of her reign abovesaid, before Edmond Anderson, Francis Windham, William Periam, and Francis Rodes, then Justices of the said lady the Queen of the Bench, and other of the said lady the Queen's liege people then there present, between the afores. Rich. by the name of Richard Libb, Gent. plaintiff, and the afores. William Haw, and Ellen his wife deforceants, of the tenements afores. above in form afores. demised, amongst other things by the name of one messuage, one cottage, two gardens, 70 acres of land, one acre of meadow, 10 acres of pasture, 60 acres of wood, and 10 acres of furz and heath, with the appurtenances in Goring and Whitchurch aforesaid, in Maple Deram in the county aforesaid, whereupon a plea of covenant was summoned betwixt them in the said court, that is to say, that the aforesaid Will. and Ellen, acknowledged the tenements aforesaid with the appurtenances to be the right of him the said Rich. as those which the said Rich. had of the gift of the aforesaid Will. and Ellen, and them they remised and quit-claimed, from them the said Will. and Ellen and their heirs, to the aforesaid Rich. and his heirs for ever : and further the said Will. and Ellen, granted for them, and the heirs of the said William, that they would warrant to the aforesaid

aforesaid Rich. and his heirs, the aforesaid tenements with the appurtenances, against all men for ever, as by the said fine here in court of record remaining more fully appeareth: which fine, in form aforesaid had and levied, was to the use of the aforesaid Rich. and his heirs; after which fine, so as afore is said levied, that is to say, on the 20th day of April, in the 30th year of the reign of the said lady the now Queen aforesaid, the aforesaid indenture to the aforesaid Rich. as before is said made, before the aforesaid Justices of the said lady the Queen of the Bench here was inrolled. And the said Eliz. further saith, that she to that grant of the reversion of the tenements aforesaid, with the appurtenances above as before is said demised, by virtue of the fine aforesaid, did not attorn or agree to the aforesaid Rich. and this she is ready to verifie, whereupon she prays judgment, if the aforesaid Rich. his action afores. against her ought to have, &c. And the afores. Rich. saith, that the afores. plea of the afores. Eliz. above in bar pleaded, and the matter in the same contained, is insufficient in law to bar him the said Rich. to have his action afores. against the afores. Eliz. And that he to that plea in form afores. pleaded needeth not, nor by the law of the land is bounden to answer, and this he is ready to verifie, wherefore for want of a sufficient plea in bar in this behalf made, the afores. Rich. prays judgment, and his damages by the occasion of the waste afores. to be to him adjudged: and the afores. Eliz. inasmuch as she hath alledged sufficient matter in bar of the action afores. which she is ready to verifie, which matter the afores. Rich. doth not deny, nor to the same any ways answereth, but that averment altogether refuseth to admit, prays judgment, and that the afores. Rich. may be barred from having his action afores. against her, &c. And because the Justices here will advise themselves of and upon the premises, before they give their judgment thereof, day is given to the parties afores. here, until from the day of Easter in 15 days, to hear their judgment thereof, because the same Justices here thereof are not yet, &c.

H Y N D E ' s Cafe.

Trin. 33 Eliz.

In the King's Bench.

1 And 215, 216.
Cumberb. 67.
Skinner 184,
186.

(a) Godb. 433.

(b) Cr. El. 285,
917. 6 Co. 68.
a. Co. Lit. 320.
a. 266. b.
1 And. 286.
F. N. B. 60. 9.
(c) 1 And. 286.
Co. Lit. 309. b.
321. b. 2 Co.
36. a. 5 Co. 113.
b. 8 Co. 94. a.
2 Inst. 672.

RICHARD LIBB Esq. brought an action of waste against Elizabeth Hynde, and declared, that William Hawe was seised of a house called Place, and certain lands in Goring and Whitchurch in the county of Oxford: and 4 *die Julii*, anno 29 Eliz. by his deed indented demised the tenements aforesaid to Robert Garrard from the feast of Christmas then past for 16 years, who, 20 *Augusti*, the said 29th year, assigned his interest to the defendant: and that the said William Hawe (a) 7 *Maii*, anno 30 *Reg' Eliz'* by deed indented and inrolled in the court of C. B. *Termino Paschæ*, in the said 30th year (within six months, according to the form of the statute) for the consideration of 120 l. bargained and sold the said reversion to the said Libb, now plaintiff, in fee, and assigned the waste in digging of clay, &c. The defendant confessed that William Hawe was seised of the said land, and that he by the said indenture demised to Robert Garrard, and that he assigned to the said Elizabeth, *prout*, &c. But she further said, that after the said 7th day of May, in the said 30th year, and before the said indenture of bargain and sale was enrolled, the said William Hawe, 15 *Paschæ*, in the said 30th year, levied a fine of the tenements aforesaid to the said Richard Libb, now plaintiff, *come ceo*, &c. which fine was to the use of the said plaintiff and his heirs, after which fine levied, *scil.* 29 *Aprilis*, in the said 30th year, the said deed indented was inrolled in the said court of C. B. And further the def. said, that she never attorned; and upon this plea the plaintiff demurred in law, and in this case two points were moved. 1. If the conusee of the fine after the said indenture inrolled should be said *in* by the (b) fine, or by the bargain and sale, for if he should be adjudged *in* by the fine, no action of waste would lie for want of attornment; and if he should be *in* by the indenture inrolled, then there needed no (c) attornment. And it was unanimously resolved by Sir Edm. Anderson and his companions, Justices of the Common

Common Pleas, that when Hawe by deed indented bargained and sold the reversion to Libb and his heirs, and before the inrollment levied a fine to Libb and his heirs, and afterwards the deed is inrolled within the six months, that the conufee should be (a) *in* by the fine, and not by the indenture inrolled; for when the fee simple passed by the fine to the conufee and his heirs, the inrollment of the deed indented afterwards could not divest and turn the estate out of himself, which was absolutely settled in him by the fine; for then, where he was *in* before in the *per*, he would be now in the *post*. Also when the common law and statute law concur, the common law shall be (b) preferred: and it is true, that the inrollment shall have relation to the delivery of the deed, but that is to (c) avoid mean estates or charges made to a stranger by the bargainor after the delivery of the deed, and before the inrollment, but not to divest any estate lawfully settled in the *interim* in the bargainee himself. And the statute of 27 H. 8. c. 16. of Inrolments, speaks by bargain and sale only, and here it is not by bargain and sale only, but the estate is passed originally by the fine. The other point was, whether the defendant should be in this case admitted to aver when the deed was inrolled, *sc.* such a day after the fine levied, and before the inrollment; and it was objected, 1. That in the case at bar it should be intended in law, that the deed was inrolled the first day of the said Easter term, for the term as to divers purposes is but one (d) day in law, and *eo potius*, because it doth not appear by the record what day of the term the deed was enrolled, but generally *Term' Pasch'*, and therefore it should be intended to be inrolled the first day of the term. 2. It was objected, that records (for the avoiding of infiniteness, which the law abhors) are so high and sacred that they import in themselves inviolable truth, which if any dare to deny, the law attributes so great honour and credit to them that they shall be (e) tried only by themselves, and not by the country: but if this averment should be suffered, then the effect and validity of the record would be tried by the country, which would be against the rule of law. 3. It was objected, that it would be mischievous to allow of such nice averments, and trench to the disinherison of many to draw in question the time of all inrollments of bargains and sales; for if the beginning of the term was within the six months, and the end thereof after the six months, by such averment after long possession, when witnesses are dead, the estate of the land might be drawn in question, which would be a perilous and dangerous precedent, and especially in these days, in which subornation of perjury abounds: but it was resolved *per tot' curiam*, that the (f) averment was good and lawful. And as to the first objection, it was answered and resolved by the court, that it is true, that it should be intended by presumption in law, that the

Skinner 184.
(a) Mo. 337,
338. Hob. 222.
1 Bulstr. 163.
2 Bulstr. 671,
672. Cr. El. 917.
Cr. Car. 218.
Poph. 49.
1 Brownl. 142.
1 And. 27, 113.
2 And. 161.
Yelv. 124.
Owen 70.
10 Co. 96. a.
Mo. 680, 681.
(b) 2 Inst. 672.
4 Inst. 140.
1 Leon. 6.
2 Co. 35. b.
1 And. 191.
Co. Lit. 49. a.
(c) Hob. 222.
2 Bulstr. 34.
Cr. Car. 218.
Owen 70.

(d) Godb. 433.
5 Co. 74. b.

(e) 9 Co. 25. a.
31. a. 2 Roll.
574. Co. Lit.
260. a. 117. b.

(f) 1 And. 286.
Cr. Jac. 451.

(a) 2 Co. 48. a.
5 Co. 7. b.
Cawdry's case.
6 Co. 73. b.
Co. Lit. 373.
Hob. 298.
2 Bulstr. 314.
(b) Hutt. Argu-
ment 57.

(c) 8 Co. 67. a.
9 Co. 25. a. 31.
a. Co. Lit. 117.
b. 260. a.
2 Rol. 574.
(d) Cr. Jac. 451.

(e) 1 Roll. 862.

(f) 6 Co. 15. b.
Doct. pla. 307.
308. 352. Hard.
158. 2 Sid. 145.
Hob. 147, 156.
Co. Lit. 260. a.
(g) 2 Roll. 575.
2 Roll. Rep.
119.

(h) Cr. Jac. 375.
Co. Lit. 125. b.
6 Co. 15. b.
(i) 2 Roll. 588.

(k) Latch. 157.

the deed was inrolled the first day of the term : but (a) *flabit præsumptio donec probetur in contrarium*. And because the plaintiff has by his (b) demurrer confessed the inrollment to be after the fine, for this cause the presumption vanishes and becomes of no force, and the mutual consent and confession of both parties shall stand. As to the second objection, it was answered and resolved by the court, that it is true that (c) records import in themselves truth, and conclude all men from denying any thing appearing within the record, as antedate, &c. *Vide* 37 H. 6. 21. b. Plow. Com. 7 & 8 Eliz. Dyer 242. But to take (d) averment which stands with the record, and which doth not impugn any thing apparent within the record, the law doth well admit and allow : as against a fine (e) upon release, to say that the conusee had nothing at the time of the fine levied, as it is held in 16 H. 7. 5. b. So against the King's letters patent under the Great Seal shewed in court, none can deny them, but *non* (f) *concessit per præd' literas patentes*, is a good plea, for although there be such letters patent, yet perhaps nothing pass by them, and so *per consequens non concessit*. And although (g) inrollment, or other matter of record shall not be tried *per pais*, yet the time when the inrollment was made shall be tried *per pais*, for the inrollment itself shall never be drawn in question (for that is agreed by both parties) but only the time of it, as in the other case, where one pleads a grant of the King by his letters patent under the Great Seal, and the other pleads *non concessit* by the same letters patent, in that case the letters patent are confessed, but the effect and operation of them is denied, and therefore the trial shall not be where the letters patent bear date, but where the lands (h) lie, as it was adjudged. So if (i) profession is denied, it shall be tried by the Spiritual Court, but if the time of the profession is in issue, it shall be tried by the country, as it is held in 9 H. 7. 2. As to the third objection, it was answered and resolved *per tot' cur'*, that if such averment should not be admitted, great injustice would be protected, and great inconvenience ensue on the other side ; for suppose (as hath been said) that the beginning of the term is only within the six months, and in truth the inrollment was towards the end, out of the six months, if such averment shall not be received, the bargainor would be disinherited against truth and justice, and no inconvenience can rise on the other side, for the presumption of the law (as has been said) he who strives to avoid the bargain, (k) ought to make manifest proof thereof, for *actori incumbit onus probandi* : and as to

to fear of perjury, (a) *nullum iniquum est in jure præsumendum*; (a) Hard. 64. and these days are not to be tainted with such infamy of abundance of perjury, as has been surmised; and commonly those who have most corrupt consciences, are oftentimes most suspicious, and complain most of the iniquity of the times.

3. It was said by some of the Justices, that if it be admitted that the inrollment should be presumed to be made in *Quindena Paschæ*, and that at the same time the fine was also levied, that then the bargainee should have (b) election to have the reversion by the one, or by the other: but in respect of the former resolutions, this point was not resolved by the court.

(b) Mod. Rep.
176 1 Brownl.
142. Yelv. 123.
124. 2 Co. 35.
b. 37. b. 2 Roll.
787. Hob. 159.
1 Jones 206.
Poph. 95.
2 And. 203.

BOROUGHES's Case.

Pasch. 38 Eliz.

In the King's Bench.

Sold. 124.
Cr. El. 462.
Moor 404.

[Co. Lit. 201.
2 Hard. 306.

BETWEEN Boroughes and Taylor the case was ; Queen Elizabeth made a lease for years, rendering rent payable at the receipt of her Exchequer at Westminster, *seu ad manus ballivorum seu receptorum, &c.* with the usual condition, to be void by nonpayment of the rent ; and afterwards the Queen granted over the reversion to another and his heirs, and whether the patentee should demand the rent to take advantage of the condition, was the question, upon a special verdict. And it was moved, that the demand ought to be made at the receipt of the Excheq. for that is the certain place appointed in the lease, and principally because Westm. is added, and therefore of necessity it ought to be demanded there and not upon the land ; and although the reversion is granted over, yet *that* does not alter the place where the rent shall be paid ; as if a common person makes a lease of his manor of D. rendering rent to be paid at his manor of Sale, with condition of re-entry, &c. for nonpayment, and afterwards he grants over the reversion of the manor of D. yet the grantee ought to demand his rent at the manor of S. And although it is further said, *seu ad manus ballivorum seu receptorum, &c.* yet forasmuch as it is for the benefit of the lessee, and he has election either to pay it at a certain place, or to the bailiff or receiver of the lessor, and forasmuch as the said words are words of abundance, for the (a) law implies them, although they were omitted, and because the condition is here penal to the lessee that he shall lose his interest, for these reasons the law requires that the patentee ought to make demand upon the land, and not elsewhere. And therefore if a common person makes a lease for years of the manor of D. rendering rent at his manor of Sale, with condition of re-entry, if the rent be not paid at the place aforesaid,

aforesaid, or to the hands of the lessor himself, in that case for the reasons aforesaid, the demand ought to be made at the manor of Sale, and chiefly because the said words are abundant, and no more than the law, without them, would have implied, wherefore it was strongly urged and concluded, that, in the case at bar, the demand ought to be made at Westminster, at the place where the receipt of the Queen's Exchequer is kept: but it was adjudged by Popham C. J. Clench, Gawdy, and Fennor, Justices, that in the said case the demand ought to be made upon the (a) land; and in this case divers points were unanimously resolved by the court. 1. That if in case of a common person, the rent reserved upon the demise be payable at a (b) place out of the land, that he who will take advantage of a condition for non-payment of such rent, ought to demand the rent at the place where it is appointed to be paid; for the limitation of the payment of the rent off from the land, doth not alter the nature or quality of the rent, nor of any thing incident to it, but it is, to all intents, a rent issuing out of the land, and not a sum in gross, for it shall pass with the reversion as incident to it, and shall be suspended by entry of the lessor into any part of the land leased, and shall be apportioned by recovery of part in waste, or entry into part for forfeiture, &c. and shall have all other qualities of a rent in the same manner as if it had been payable upon the land; and therefore the opinion in Kidwelly's case, in Plow. Com. 70. that he in the reversion may enter for non-payment of such rent without any (c) demand made, was utterly denied by the whole court in this case; and the Justices said, that it had oftentimes been adjudged to the cont. 2. When the Q. makes a lease for years, rendering rent with condition *ut supra*, the Q. shall take advantage of the condition (d) without any demand; but when she grants the reversion over, her grantee shall not take advantage of the condition (e) without demand; for the reason that the Q. shall take advantage of the condition without demand, was not in respect of the nature or quality of the rent, or that the law adjudges, that such rent reserved to the Q. was not *omnino* demandable, but that the lessee in such case ought to do the first act, *sc.* either to pay or tender the rent; for it was resolved by the court, that as long as the reversion and rent continue in the Q. the law dispenses with the demand as a thing indecent, and against the dignity of the Q. to attend upon her subject to make a demand of him; but the law (which always requires that decorum and conveniency be observed) appoints the subject to attend upon his sovereign, and in such case to do the first act, although it be in case of a condition, which trenches to the destruction of his estate, but this is but a personal prerogative annexed to the person of the K. and not in respect of the nature or quality of the rent; and therefore

(a) Goldsb. 124.
Hard. 306.
Cr. Eliz. 167,
415, 462.
Co. Lit. 201. b.
202, 210. b.
(b) Co. Lit. 153.
2. 202. 2.
1 Roll. 459.
2 Roll. 428.
Cro. Car. 503.
2 Jones 33.

(c) Dy. 68. pl. 23.
24, 329. pl. 12.
Moor 598.

(d) Latch. 28.
Moor 210, 296,
5 Co. 56. a. b.
(e) Co. Lit. 201.
b.
Plowd. 213. b.

(a) Co. Lit. 201.
b.

(b) 5 Co. 11. a.
8 Co. 56. b. 145.
a. 10 Co. 39. a.
11 Co. 60. a.
1 Roll. Rep. 310.
2 Roll. Rep. 393.
Litch. 25.
Palm. 433. 437.
Wing. Max. 235.
Co. Lit. 191. a.
205. a.
Lit. Rep. 111.
2 Inst. 365.
2 Sand. 351.
2 Bulstr. 133.
1 Mod. Rep. 190.
Hard. 92.
Hob. 170.
(c) Lit. sect. 331.
Co. Lit. 204. b.
1 Jones 135.
(d) 2 Roll. Rep.
393.
Co. Lit. 191. a.
2 Roll. 150.

(e) Goldsb. 124.
Cro. El. 462.
Co. Lit. 201. b.
(f) Co. Lit. 201.
b. Hard. 306.

(g) Cro. El. 462.

if he grants the reversion over, the grantee shall not take advantage of the condition without demand made of the rent. The 3d point (the great doubt of the case) which was resolved, was, that in this case the patentee ought to (a) demand the rent upon the land; and their principal reason was grounded upon a rule in law, *sc.* that the expression of a clause which the law implies, works nothing, (b) *expressio eorum quæ tacite insunt nihil operatur* & *expressa non prosunt, quæ non expressa proderunt*: and yet as (c) Littleton saith, it is well done to put in such clauses to declare and express to laymen which have no knowledge of the law, what the law requires in such cases: as in 30 Aff. 8. a lease is made to two for term of their lives, (this clause being added and expressed, & *diutius* (d) *eorum viventi*) and afterwards they made partition, and one died, and he in the reversion entered, and his entry adjudged lawful notwithstanding the said words, & *diutius eorum viventi*, for without them so much was *tacite* implied by the law. *Vide* 17 E. 3. 7. John Hull's case. 27 H. 8. tit. Office. Br. 17. in case of an act of parliament, 2 H. 7. 9. in case of a *liberate*, Plow. Com. 486 & 545. And it was resolved, that if the King makes a lease for years rendering rent, without appointing any place, or to whose hands it shall be paid, the lessee may by law pay it either at the receipt of the Exchequer, or to the hands of the King's Bailiffs or Receivers, which the King has authorized to such purpose. And therefore the special and usual limitation of payment of rent in such cases at the receipt of the (e) Exchequer, or to the hands of the King's Bailiffs or Receivers, &c. imports no more than the law without it would have (f) implied, and therefore *nihil operatur* thereby; and although the said clause is *ad receptum seaccarii, &c. apud Westm* yet it being affirmative and declaratory, it is not necessary that the receipt be held at Westm', for if the receipt of the Exchequer be held at another (g) place, the rent is to be paid there; for as to this point, the law would have implied that which is expressed, *sc.* at Westm. and more, *sc.* at whatsoever other place the receipt be kept: then, in the principal case, if the rent had been reserved generally, the patentee ought to have demanded it upon the land, & *per consequens* so ought it to be done in the case at bar. And it was said, as the law has appointed the receipt of the Exchequer to be the place where the King's revenues shall be received, so in the case of a common person, the law has appointed a place where his rent (if no other place by mutual agreement of the parties be appointed) shall be paid, and that is, upon the land demised, and there he ought to make a demand of it.

P A L M E R's Case.

Hil. 39 Eliz.

In the King's Bench.

BETWEEN Palmer, plaintiff, and Umphrey, defendant, in the King's Bench, it was resolved *per totam curiam*, that if a *Fieri facias* comes to the Sheriff to levy the money of the goods and chattels of the defendant, and the Sheriff, by writing, reciting that the defendant has a term for years (and shews what) and supposing that it began 2 & 3 Phil. & Mar. (as it was in the case at bar) where in truth the term began 3 & 4 Phil. & Mar. sells the same term, the sale is void, for there is no such (a) term: but notwithstanding this false recital, if the Sheriff sells also all the interest which the defendant has in the said land (as also in the case at bar he did) this sale is good. And Popham, Chief Justice, said, in this very court, anno 26 El. between Sir George (b) Sydnham and Rolles, the case was such; the Sheriff in the like case reciting that Rolles had a term of a parsonage *pro termino diversorum annorum adtunc ventur*, sold it by force of a *Fieri facias* to another, and it was adjudged good enough. For by common intendment the Sheriff cannot have precise knowledge of the certainty of the beginning, and the certainty of the end of the term; but if he takes upon him to recite the term, and (c) misrecites it, and sells the same term, it is void; but if he sells all the (d) interest that the defendant has in the land, it is good enough, notwithstanding the misrecital as is aforesaid. And so observe the difference between the sale of a term, and an extent of a term, for accordingly it was adjudged, M. 32 & 33 Eliz. in *scaccario*, that where it was found by inquisition that the Queen's (e) debtor was possessed of certain lands *pro termino quorundum annorum adtunc ventur* that this inquisition was insufficient, for a term cannot be extended without

Goldsb. 172. 173.
Cr. El. 584.
Styl. 62.
Owen 18.
Moor 702. pl.
976.

(a) Cro. Car.
399.

(b) Goldsb. 172.
373.
Cr. El. 584.

(c) Godb. 433.
Cart. 155.
(d) Goldsb. 173.
Cr. El. 584.

(e) 2 Leon. 121.
3 Leon. 204.
Lane 50, 51.

shewing the beginning and certainty of the term, and the reason is this, because after the debt satisfied, the party is to have his term again, if any part of it remains, which ought to appear, and thereupon the party may have remedy to remove the hands of the Queen, or other person: but in the case of a sale upon the *Fieri facias*, the Sheriff may sell all the interest or term which the defendant has in such land, and never mention it in his return, but generally, *quod fieri fecit de bonis & catallis, &c.* But if the execution in the principal case should be levied, it would tend to the ruin of a poor man who made great complaint to the court; the Attorney-General coming into the court at the request of the poor man, perused the record, and thereby found that the execution was by force of an *Elegit*, which ought to have been made by inquisition, for the statute of Westm. 2. cap. 18. which gives the *Elegit*, provides, *quod vicecom' liberet ei omnia catalla, &c. & medietatem terræ suæ, quousque debitum fuerit levatum per rationabile pretium* (which refers to chattels) *& extentum*, which refers to land, and *rationabile pretium*, and *extent* ought to be found by (a) inquisition and verdict, for *that* is implied in law, and the court (will adjudge) as the law appoints, although it be not so expressed, *vide* 10 E. 4. 11. 7 R. 2. Barr 241. (b) Proof is intended trial by verdict, and the words of the writ of *Elegit* are according to the said statute, and therewith agrees 2 Mar. (c) Dyer 100. that the extent and appraisement ought to be *per sacramentum duodecim*, and not by the Sheriff, and many precedents: and because the term was mistaken in the inquisition, and the term so mistaken was appraised by it, and the Sheriff could not sell any term but *that* only which was appraised by the jurors of the inquisition, he therefore moved the court, that the said sale was utterly void, and so was the opinion of the whole court: and judgment given accordingly.

(a) Cr. El. 584.

Cr. Jac. 569.

Antea 67. a.

2 Inst. 396.

Dyer 100. pl. 71.

2 Bulstr. 97.

Dall. 28. pl. 1.

Goldsb. 173.

(b) Hob. 93, 217.

2 Co. 108. a.

11 Co. 39. a.

Cr. Jac. 188,

232, 381.

3 Bulstr. 55.

2 Brownl. 57.

1 Roll. Rep.

222, 261.

2 Rol. 595.

1 Sid. 313. Moor 312. pl. 253, 181. pl. 322, 845. pl. 1140. 888. pl. 1250. Perk. sect. 791. 3 Inst. 98.

Br. Condition 151. (c) Goldsb. 173. Cr. El. 584, 735. Dy. 100. pl. 71. 2 Inst. 396. 2 Bulstr. 97.

HOLLAND'S Case.

Trin. 39 Eliz.

In the King's Bench.

WILLIAM ARMIGER plaintiff in prohibition against William Holland, parson of Northcreek in the county of Norfolk, and declared, that Matthew Bishop of Canterbury collated by lapse John Meye to the said church of Northcreek, who was therein inducted, and further had the moiety of the church of Darsfield in the county of York, and afterwards, 17 Augusti, anno 19 Eliz. he was nominated and elected to be Bishop of Carlisle; after which election, and before consecration and installation into the said bishoprick, scil. 18 Augusti, anno 19 Eliz. the Queen by her letters patent, *de gratia sua speciali, ac ex certa scientia, & mero motu suis concessit, & licentiam & potestatem dedit præfat' J. Meye, quod ipse in ipsam ecclesiæ cathedralis Carl' consecrat' procuret & obtineret; necnon realem, actualem & corporalem possessionem, &c. recipere & obtinere, nihilominus præd' medietat' dictæ rector' de Darsfield, ac rectoriam de Northcreek, una cum dicto episc' quamdiu eidem episcopat' præset, retinere & possid', ac fructus & emolumenta inde quamdiu eidem episcopat' præset in suos proprios usus convertere, &c.* And afterwards 29 Sept. anno 19 Eliz. the said John Meye was consecrated and installed into the said bishoprick, and was, and yet is Bishop of the same see: and the plaintiff claimed a lease for years in the said rectory of Northcreek by force of a demise made by indenture by the said Bishop, 1 Maii, anno 20 Eliz. for a term of years yet enduring; and that the defendant being now lately presented by lapse by the Queen, pretending the said letters patent of the Queen made to the said J. Meye were void, sued for tithes in the Spiritual Court, &c. And the def. *pro consultatione habenda* said, that the said church of Northcreek at the time of the induction of the said J. Meye was, and yet is *benefic' cum cura animarum, & ultra annum valorem 8l. viz. 8l. 10s.* And afterwards the said J. Meye (a) accepted the moiety of the said church of Darsfield, and was instituted and inducted thereto, and the pleading was,

Moor 542, 543.
Cra. El. 601.
Dav. 77, 78.
Hob. 156.
2 Brownl. 46.
2 Roll. Rep. 453.
3 Salk. 37.

(a) 1 Sid. 163.

(a) Co. Lit. 17.
b. 10 Co. 136.

(b) Dav. 69. a.
Postea 78. b.
89. b.
2 Brownl. 45.

Dav. 79.
(c) Moor 542.
Cro. Fl. 601.
4 Co. 79. b.
Cro. Car. 357.
476. Hetl. 125.
Lit. Rep. 239.
Co. Lit. 120. a.
2 Roll 152.
Dr. & Stud. lib.
2. cap. 31. F.
N. B. 24. L.
1 Jones 404.
2 Brownl. 45, 46.
Vaughan 21.
Heb. 166.
(d) F. N. B. 35.
H. Postea 79. b.
6 Co. 39. b.
Goldso. 141.
2 Wilton 174.
175, 176, &c.
3 Burro. 1504.
3505, 1506, &c.

Postea 79. a.

(f) Cawly 23.
Co. 29. b.
Cro. Car. 357.
Eyer

ad (a) medietat' rectoria, where it should be *ad rector' medietatis*, &c. (but the court took it to be all one in effect) and that the said church of D. *fuit beneficium cum cura animarum*, and confessed the said letters patent *prout*; and concluded that *praetextu praemissorum*, the church of Northcreek became void, and title to present by lapse devolved to the Queen, who presented the def. to it 15 Feb. 1592, and made no mention of the act of (b) 21 H. 8. cap. 13. in his plea; and upon this plea the plaintiff demurred in law. And in this case two points were resolved. 1. That before the statute of 21 H. 8. cap. 13. if one had a benefice with cure, and accepted another benefice with cure, that the first benefice was (c) void, but it was not an avoidance by the common law, but by the constitution of the Pope, of which avoidance the patron might take notice if he would, and might present if he would without any deprivation; but because the avoidance accrued by the ecclesiastical law, no lapse incurred without (d) notice, as upon deprivation or resignation, and yet the patron might present, and take upon him notice if he would; so that for the benefit of the patron the church is void in the principal case, but not for his disadvantage: and according to this difference it is adjudged in Hil. 24 E. 3. 33. that in a *Quare impedit* brought by the King against the Bishop of Worcester, it was a good title for the King that the predecessor of the Bishop presented to the same church one A. who afterwards accepted another benefice, by which acceptance the church in question was void, and remained void till the temporalities of the Bishop came to the King's hands; and so it belonged to him, &c. And the King upon this title by award of the court had a writ to the Bishop, which proves that the church was void in fact without any deprivation, to which the K. might by law present his clerk; and therewith agree the books in 9 (e) E. 3. 22. a. 10 E. 3. 1. 14 H. 7. 28. b. 14 H. 8. 17. a. F. N. B. 34. l. *Et dictum est in 10 E. 3. 1.* that in such cases both churches shall be void, and by Parn- ing, the constitution of plurality is a general judgment, that all shall be deprived who hold many benefices with cure above one month after the constitution, which binds stronger against them upon their privation than particular judgment of a certain person, for a particular deprivation may be avoided by appeal, and the other not. But some opinions are in 5 E. 3. 9 & 11 H. 4. 37. that the church is not void without deprivation; but that may be understood for the disadvantage of the patron, but for his advantage it is void as is aforesaid; and so all the books are well reconciled, so that the statute of 21 H. 8. is in this point but a confirmation and affirmance of the law before: but now forasmuch as it is affirmed by act of parliament, if the first benefice be of the value of 8 l. *per ann.* the patron at his (f) peril ought to present to it, for

for inasmuch as to an avoidance by parliament every one is party, every one ought to take notice of it at his peril; but otherwise, if the first church be not of the yearly value of 8 l. for then it is void merely by the ecclesiastical law, whereof the patron need not take notice at his peril as is aforesaid.

2. It was resolved *per tot' curiam*, that the said act of (a) 21 H. 8. was such a general act, that the Judges (although it be not set forth in pleading by the party) ought to take notice of it *ex officio*. *Nota* reader, the rule of the law is, that of general statutes the Judges ought to take notice, although they be not pleaded, otherwise of special or particular statutes: and for the better understanding of your books in this point, and which shall be said in judgment of law *statutum generale*, and which is *statutum speciale*, it is to be known, that *generale* (b)

dicitur a genere, & *speciale a specie*; and there are *genus*, *species*, & *individua*: know that spirituality is *genus*, bishoprick, deanery, &c. are *species*, and bishoprick or deanery of Norwich, *individuum*, *sic dict' quia in* (c) *partes dividi nequit*. And therefore it was resolved in the case at bar, that forasmuch as the act of 21 H. 8. concerns the whole spirituality in general, it was a general act whereof the Judges ought to take notice.

And *Pasch.* 31 Eliz. Rot. 514. it was adjudged between Claypool (d) and Carter in C. B. and affirmed by writ of error in B. R. Hil. 32 Eliz. Rot. 791. that the act of 18 Eliz. cap. 6. concerning colleges in the two Universities, and the colleges of Eaton and Winchester was a particular act whereof the Judges shall not take notice. But the statute of (e) 13 Eliz. cap. 10. and 18 Eliz. cap. 11. concerning Colleges, Deans and Chapters, Hospitals, Parson, Vicar, or any other having any spirituall or ecclesiastical living, are general acts, whereof the Judges shall take notice, which case is like the case at the bar. But it was adjudged Trin. 30 Eliz. in B. R. between Elmer Bishop of London, and Gate, for the scite and demesnes of the manor of Draiton in the county of Middlesex, that the statute of (f) 1 Eliz. concerning Leases, &c. made by Bishops, was a special act, because it concerned the Bishops only, who are but *species* of the spirituality, and therefore of such special law the Judges shall not take notice if it be not pleaded; and therewith agrees 13 Edw. 4. 8. b. & *sic de similibus*: so this word (officer) is a general word or *genus*, (Sheriff) is a special word or *species*; and Sheriff of Norfolk is *individuum*: and therefore the statute of W. 1. cap. 26. (g) by which it is enacted, *That no Sheriff, nor other the King's Officer, take any reward to do his*

office,

8 Co. 28, 137,
&c. 6 Co. 29. b.
Ante 13. 4 Co.
78. b. Fitzgib.
45. 2 Lev. 151.
Cro. Car. 354.
&c. Yelv. 7.
(a) Moor 542.
Cr. El. 601.
Doct. pla. 337.
Yelv. 106.
2 Brownl. 208.
2 Roll. 466.

(b) Doct. pla.
336.

(c) Doct. pl. 336.

(d) Postea 120.
b. Moor 593.
1 Leon. 306.
Doct. pl. 337.
Sav. 128, 129.
1 And. 248,
249, &c.
(e) Postea 120. b.
Yelv. 106.
Dyer 27. b. pl.
178, 179, 187,
188. 2 Roll. 465.
Doct. pl. 337.
Noy 124.
2 Brownl. 208.
1 Mod. Rep.
204, 205. Dyer
87. a. pl. 87. fo.
119. a. Hob. 310.
(f) 2 Roll. 466.
Mod. Rep. 205.
Lit. Rep. 306.
Doct. pl. 337.
5 Co. 2. a.
Cr. Jac. 112.
10 Co. 59, 60.
Plowd. 65. a.
(g) Doct. pl. 3.

- office, but shall be paid of that which they take of the King, is a general act, because it extends to officers *in general*: but the statute of (a) 23 H. 6. cap. 10 which extends only to Sheriffs, is but a particular and special act, as it is held 3 Ma. Dy. 119.
- (a) Plowd. 65. a.
1 Sid. 23, 24.
356 Doct. pl.
337. Hob. 13.
Moor 468.
2 Sand. 154, 155.
3 Co. 59. b.
Cro. El. 460.
1 Vent 85.
(b) Doct. pl.
337. Dyer 27.
pl. 179.
(c) Doct. pl. 337.
- a. So mystery or trade is a general word, trade of grocery is special, and this grocer by name is *individuum*: and therefore acts of parliament concerning mysteries or trades, are general acts: but an act of parliament concerning the trade of (b) grocery is a special act, as it is said 28 H. 8. Dyer 27. because the trade of grocers contains under it but *individua*, or singular persons, as this or that grocer by name, *vide* 10 E. 4. 7. a. The statute of Marlebridge, cap. 3. *Non (c) ideo puniatur dominus per redemptionem*, is a general law for the reasons aforesaid, for this word *seignior* is a general word. But an act concerning all the nobility, (d) or Lords of the Parliament, or all the Bishops of England, or all corporations made by King H. 6. are special and particular acts for the causes aforesaid, as it is held in the case of the Lord Say, in 13 E. 4. 8. b. Know reader, if an act is special which extends *ad species*; *a multo fortiori*, it is special or particular which extends *ad individua*: *Vide (e)* 14 E. 4. 1. a. & 43 (f) Aff. 29. So observe what act as to persons is general, and what not. Now know, that although the matter is special, so that under it there are but *individua*, yet if it is general as to persons, thereof the Judges shall take conuſance; but if the act concerns *aliquid singulare seu individuum*, although it is general as to persons, yet the Judges shall not take conuſance thereof: as appeal is a special action, and contained under this general word writ; and yet the statute of *Magna Charta*, cap. 34. which concerns (g) appeals, is general, and the Judges ought to take notice thereof, as it is held in 10 E. 4. 7. a. But if an act was made that no (h) appeal shall be brought of the death of J. S. this act is particular, *causa qua supra*: so the act of *Magna Charta*, cap. 25. of Waste, (i) W. 2. cap. 25. concerning assises, and cap. 18. concerning assise by tenant by *Elegit*, cap. 41. concerning *contra formam collationis*; 23 H. 8. of Attaint & *similia*, are general laws, although they concern special actions; the same law, 4 H. 7. cap. 17. and Merton, cap. 6. of (k) Wards, & *sic de cæteris*: but although the act as to persons is general, but the matter thereof concerns *individua*, or singular things, as any (l) particular manor, or house, &c. or all the manors, houses, &c. which are in one or sundry particular towns, or in one or divers particular counties; these are such particular acts, whereof the Judges shall not take conuſance,

if

if they be not pleaded or alledged by the party ; but of every act (although the matter thereof concerns *individua*, or singular things, yet) if they touch the King, the Judges *ex officio* ought to take conufance, for every fubject has intereft in the King, as in the head of the commonwealth ; and as the inferior members cannot efrange themfelves from the actions and paffions of the head, no lefs can any fubject efrange himfelf from any thing which touches or concerns the King, their fupreme head. *Vide* Plow. Com. in the Lord Barkley's cafe. *Vide* for thefe matters, 21 E. 4. 59. a. 37 H. 6. 15. & Plow. Com. in Wimbifh's cafe 53. And Tanfield, Godfrey, and others, were of counfel with the plaintiff, and Coke and Houghton with the defendant.

Hob. 226. Doct.
pla. 338, 339.
8 Co. 28. a.
138. b.
Antea 13. a.
Plowd. 231. a.
Godb. 168.
Jenk. Cent. 215.

The CASE of

CORPORATIONS.

Mich. 40 & 41 Eliz.

IN this term at Serjeant's Inn in Fleet-street, it was demanded of the Chief Justices, Popham and Anderson, Periam, Chief Baron, and the other Justices, that where divers cities, boroughs and towns, are incorporated by charters, some by the name of Mayor and Commonalty, or Mayor and Burgeses, &c. or Bailiffs and Burgeses, &c. or Aldermen and Burgeses, &c. or Provost, or Reve and Burgeses, or the like. And in the said charters it is prescribed, that the Mayors, Bailiffs, Aldermen, Provosts, &c. shall be chosen by the Commonalty or Burgeses, &c. If the ancient and usual elections of Mayors, Bailiffs, Provosts, &c. by certain selected number of the principal of the Commonalty, or Burgeses, commonly called the Common Council, or by such like name, and not in general by the whole Commonalty or Burgeses, nor by so many of them as would come to the election, were good in law, forasmuch as by the words of charters, the election should be indefinitely by the Commonalty, or by the Burgeses, which is as much as to say by all the Commonalty, or all the Burgeses, &c. Which question being of great importance and consequence, was referred by the Lords of the Council to the Justices, to know the law in this case, because divers attempts were of late in divers corporations, contrary to the ancient usage to make popular elections: and it was resolved by the Justices, upon great deliberation and conference had amongst themselves, that such ancient and usual elections were good and well warranted by their charters, and by the law also; for in every of their charters they have

Dav. 44. b.
Lane 21.
Jenk. Cent. 273.
3 Bulstr. 71.
Hob. 15.

have power given them to make laws, ordinances, and constitutions, for the better government and order of their cities or boroughs, &c. by force of which, and for avoiding of popular confusion, they by their common assent constitute and ordain, that the Mayor or Bailiffs, or other principal officers, shall be elected by a selected number of the principal of the Commonalty, or of the Burgesses, as is aforesaid, and prescribe also how such selected number shall be chosen, and such ordinance and constitution was resolved to be good and allowable, and agreeable with the law and their charters, for avoiding of popular disorder and confusion: and although now such constitution or ordinance cannot be shewed, yet it shall be presumed and intended in respect of such special manner of ancient and continual election (which special election could not begin without common consent) that at first such ordinance or constitution was made, such reverend respect the law attributes to ancient and continual allowance and usage, although it began within time of memory: *mos retinendus est fidelissima vetustatis; quæ præter consuetudinem & morem majorum fiunt, neque placent, neque recta videntur; & frequentia actus multum operatur.* And according to this resolution the ancient and continual usages have been in London, Norwich, and other ancient cities and corporations, and God forbid that they should be now innovated or altered, for many and great inconveniences will thereupon arise, all which the law has well prevented, as appears by this resolution.

Jenk. Cent. 273.

Qu. Whether a by-law can take away the right of election in the Commonalty?

[When a corporation is destroyed, the lands revert to the crown, who is their founder and patron. See Whitlock's Annals, 351.]

D Y G B Y 's Case.

Hil. 41 Eliz.

In the King's Bench.

Co. Ent. 203.

pl. 9.

Jenk. Cent. 273.

Mo. 434, 435.

&c. Goldsb. 162,

163, &c.

Vaugh. 21.

2 Roll. Rep. 453.

Lit. Rep. 304.

(a) Antea 75. b.

Postea 89. b.

217. a.

21 H. 8. cap. 13.

BETWEEN Richard Robins, plaintiff, in *Ejectione firmæ*, for parcel of the glebe of the rectory of Horton in comitat' Lincoln, on a demise made to him by Edward Wickman, Parson there, and William Gerrard and John Prince, defendants: upon not-guilty pleaded, the jurors gave a special verdict to this effect; (which action began in the King's Bench, Hil. 38. Eliz. Rot. 781.) The said rectory of Horton is a benefice with cure, and of the annual value of 8l. & *amplius*, to which (the cure being void) George Digby, Esq. patron thereof, did present Robert Merick his clerk, who at his presentment was admitted, instituted and inducted: and afterwards Queen Elizabeth, *anno regni sui* 29, presented the said Merick to the church of Stanes in the county of Middlesex, which is a benefice with cure; to which church of Stanes the said Merick was admitted and instituted, and before induction, Catherine, the late wife of the Lord Bouroughe admitted and received by writing, under her seal the said Merick to be her domestick chaplain, according to the form of the statute, 21 H. 8. (a) And afterwards the Archbishop of Canterbury, by his letters of dispensation; *cum eodem Rob. Merick, ut una cum rectoriâ de Horton diocef. Lincoln' quam adtunc obtinuit, ecclesiam de Stanes diocef. Lond' recipere, & quoad vixerit retinere liberè & licitè valeat, & possit, autoritate parlamenti gratiosè dispensavit*: and afterwards the Q. by her letters patent under the Great Seal, ratified and confirmed the said letters of dispensation: and afterwards the said R. M. was inducted in the said church of Stanes, *viz.* 30 Aug. *anno* 29 El. And afterwards the Q. by lapse, *anno* 33. present-

presented the said Edward Wickman to the church of Horton, who was admitted, instituted and inducted, and demised to the plaintiff, upon whom the defendants, as servants of the said Robert Merick, entered and ejected him; and if they were guilty or not, was the question: and it was adjudged for the plaintiff, that the said (a) dispensation came too late, because it came after the institution, for by the institution, *ecclesia plena & consultata existit* against all persons but against the King. And it is to be known, that every rectory consists upon spirituality and temporality; and as to the spirituality, *sc. cura animarum*, he is complete Parson by the institution; for when the Bishop, upon examination found, admits him able, then he institutes him, and says, *Instituo te ad tale beneficium, & habere curam animarum* of such a parish, & (c) *accipe curam tuam & meam, &c.* Vide 33 H. 6. 13. But as to the temporalities, (d) as the glebe land, &c. he has no freehold in that till induction, vide Hare and Buckley's case. Plow. Com. 528. And for the better understanding of our books, know reader, *quod per generale concilium Lateranense tentum sub Innocentio Papa tertio; statutum est quod quicumque recipit aliquod beneficium habens curam animarum annexam, si prius tale beneficium obtinebat, eo sit jure ipso (e) privatus, & si forte illud retinere contenderit, alio etiam spoliatur; is quoque ad quem prioris spectat donatio, illud post receptionem alterius conferat cui merito viderit conferendum*, and this council was held anno Domini 1215. vide tom. 4. 221. c. 29. de multa: by which it appears that by the acceptance of the (f) second benefice, the first is void *ipso jure*, and the patron may present if he will: and upon this general council are the books in (g) 9 E. 3. 22. a. 10 E. 3. 1. (where the said general council is mentioned) 24 E. 3. 30. a. 11 H. 4. 37. 14 H. 7. 28. 14 H. 8. 17. F. N. B. 34. l. grounded. But now what shall be called an acceptance of a second benefice with cure, within the said act of (b) 21 H. 8. is the question; and the doubt arises upon this, that although Merick by his institution was Parson as to the spirituality, *sc. to celebrate divine service and sacraments, to preach and instruct his parishioners in the true faith*, yet he is not complete Parson (for he wants his temporalities whereof he may live) till induction, and therefore he is not complete Parson till induction, and the statute is to be intended of a complete Parson. 2. It was objected, that although he shall be said complete Parson before induction, yet he has not a benefice with cure till he is inducted; for this word (benefice) as it was said, implies profit and benefit, which he cannot have till induction; and he who has *beneficium* ought to execute and *facere officium*, but none can do his office without some benefit. 3. It was objected, that the said act of 21 H. 8. doth not make the first benefice void till induction, for the words are, "And be instituted and inducted in the possession

" of

(a) Jenk. Cent.

273.

Dav. 78. a.

Goldsb. 166.

Moor 12.

Latch. 32.

2 Roll. 359, 360.

Heb. 158.

2 Wilton. 193.

104. 6 Co. 49.

W. Jones 404.

405. 3 Burr.

1504.

(b) Co. Lit. 344.

a. 119. b.

2 Inst. 356.

(c) Siderf. 427.

(d) 1 Inst. 356.

1 Palm. 349.

(e) 2 Rolls 360,

361.

4 Co. 75.

(f) Cr. Car.

357. Antea fol.

75. b. 2 Roll.

360, 361.

(g) Antea 75. b.

(b) 21 H. 8.

c. 15.

2 Wilson. 193,
194.

Hob. 158.

(a) Co. Lit. 344.
a. Lane 20.
Moor 12.

(b) 3 Co. 30. b.

(c) Antea 75. b.
Dyer 237. a.
255. a. 327. pl.
7. 6 Co. 29. b.
Cawly 23. b.
(d) 1 Jones 404.
Hob. 166.
Cr. Car. 357.
4 Co. 75.

(e) Antea 76. a.
Doct. pl. 337.
2 Roll. 466.

"of the same, &c." But it was resolved, that great inconvenience would ensue, if the first benefice should not be void by the institution to the second benefice, by force of the said constitution, for then one might be instituted to divers benefices with cure, the great cure and charge of which one could not discharge, and yet no other could be presented to any of them which would be inconvenient; and therefore *vide* *tom. 5. General' Concilior' pag. 368. cap. 64. Res ipsa loquitur plura beneficia potissimum quibus animarum cur' submissa est, non sine gravi ecclesiarum damno ab uno obtineri, cum unus in pluribus ecclesiis ritè officia persolvere, aut rebus earum necessariam curam impendere nequeat*; whereby it appears, that the great mischief before the said council was, that those who had plurality of benefices, could not discharge their pastoral duties which belonged to their functions, which functions they had to all intents by the institution before induction: and in judgment of our law, he who is instituted to a benefice has accepted it, for the church is full by the institution before any induction. 2. It has been now lately adjudged in the Common Pleas, that where a clerk was presented, (a) admitted and instituted to a benefice with cure above the value of 8l. and afterwards and before induction to the first, he accepted another benefice with cure and is inducted to it; that the first is void by the statute of 21 H. 8. for the words of the act are, "If any person (b) having one benefice with cure, &c. accept and take another, &c." and he who is instituted to a benefice, is said in law to have accepted a benefice, and to have a benefice. And Popham, Chief Justice, said, that although by the institution to the second benefice, the first is void by the ecclesiastical law, without any deprivation, or sentence declaratory, yet no lapse shall incur against the patron, unless (c) notice be given him, no more than if the church became void by resignation or privation, and yet the (d) patron may take notice if he will, and may present according to the said constitution; but he is not forced to take notice at his peril, unless he is inducted: *Quod fuit concess' per totam curiam*. And then soasmuch as the avoidance after induction is declared by the act of 21 H. 8. (to (e) which every one is party) there he ought in such case to take notice at his peril: but admitting that the first church was not void *de facto* by the institution till the induction, yet for another cause the dispensation made comes too late, for the words of the act of 21 H. 8. are, "May purchase licence to receive and keep two benefices with cure of souls," and the words of the dispensation in the case at bar are *reciper' & retin'*; and soasmuch as by his institution, the church was full of him, he could not purchase licence to receive that which he had before, and the words are in the conjunctive, *recip' & retin'*, so that he could

could not retain *that* which he could not receive. And it appears by the said judgment *in communi banco*, that within the said act of 21 H. 8. he who is only instituted, is said to have a benefice with cure; and the question, as to this point, was asked of the other Justices and Barons of the Exchequer, and they all agreed, that the dispensation in the case at bar came too late for the reasons aforesaid. And the Attorney-general, Tanfield, and Francis Moor, were of counsel with the plaintiff, and George Crook, Lawton, and others, with the defendant.

[*Nota*, by the stat. 21 H. 8. ch. 13. - a Marquis may retain six chaplains, the Lord Treasurer four, a Privy Counsellor three; the Lord Treasurer Pawlett was Marquis of Winchester, Lord Treasurer, and a Privy Counsellor; but it was adjudged that he could not retain thirteen chaplains by reason of all his offices, but only six; because the attendance of chaplains relates to his natural person, and he has but one soul although he hath three offices. See Lord Bacon's argument of Post-nati, fol. 24, 25.]

1 Saund. 58.

N O K E S ' s Case.

Trin. 41 Eliz.

Cr. El. 674, 675.
 2 Brownl. 213.
 Cr. Car. 176.
 Co. Lit. 139. b.
 Carth. 88.
 Skinner 160.

BETWEEN Nokes, plaintiff, and James defendant, in debt on a bond, the case was such: the defendant demised to the plaintiff an house in London, by these words, "demise, grant, &c." and the lessor covenanted that the lessee should enjoy the house during the term, without eviction by the lessor, or any claiming under him; and the lessor was bound to perform all covenants, grants, articles, and agreements, &c. in the indenture: the plaintiff granted his term over to a stranger. In debt upon this bond, the defendant pleaded performance of the covenants, &c. The plaintiff assigned the breach, that one Savery entered upon the assignee, and made a lease of seven years to one Ducke, if he should so long live, who brought *Ejectione firmæ* against the assignee, and recovered by verdict, and had execution; upon which the defendant demurred in law. And the opinion of the court was against the plaintiff: and in this case these points were resolved: 1. That for this covenant in (a) law upon these words, "demise, (b) grant, &c." the (c) assignee shall have a writ of covenant, 9 Eliz. Dyer 257. agrees. 2. That for this breach of the covenant in \dagger law, the bond was forfeited, for he was bound to perform all covenants, grants, &c. which extends as well to covenants in law, as to covenants in deed. 3. Although the recovery was by verdict, yet the plaintiff ought to have shewed that Savery had (d) an older title, for otherwise the covenant in law was not broken, and because he did not shew *that*, for this reason they resolved against the plaintiff. 4. It was held by Popham, Chief Justice, & *totam curiam*, that the said express covenant (e) qualified the generality of the covenant in law, and restrained it by the mutual consent of both parties, that it should not extend further than the express covenant, *quia clausa (f) general non refert ad expressa*, in this case. And so

was

(a) Hob. 12.
 Vaugh. 126.
 1 Sid. 447.
 2 Brownl. 214,
 315.
 Dyer 57. a.
 (b) 5 Co. 17. a.
 25 H. 8. Br.
 Covenant 32.
 3 Co. 63. a.
 F. N. B. 146. c.
 (c) Cro. El. 809.
 Yelv. 175.
 Cr. Jac. 73, 234.
 \dagger Cr. El. 674,
 675.
 (d) 2 Roll. Rep.
 6, 28, 287.
 2 Brownl. 214.
 Cr. El. 675.
 Hob. 35.
 D. & C. pl. 86.
 Vaugh. 122. Cr. Jac. 315. Palm. 339. Moor 861. (e) Cr. El. 674, 864. Winch. 92, 93. Yelv. 175. 1 Bullst. 3, 4. 2 Brownl. 212, 213, 214. Cr. Jac. 234. Cr. El. 864. 1 Sid. 328. 1 Saund. 60. Lit. Rep. 64, 206. Vaugh. 126. Raym. 46 Co. Lit. 384, 2. (f) Ant. 73. b. Lit. Rep. 345.
 See long 5to. Ed. 4. 27. b. 1 Lev. 57.

was it now lately adjudged in (a) Hammond's case in this court. (a) Cr. El. 675. Vaugh. 126.

Vide Reader 20 E. 3. *Counterplea de garranty* 7. it is adjudged, that if a man leases for life rendering rent, (b) and further binds himself and his heirs to warranty, here the express warranty doth not toll the warranty in law, for if he in the reversion grants over his reversion, and the lessee attorns, and afterwards is impleaded, he may (c) vouch the grantee by the warranty in law, or he may vouch the lessor by the express warranty; and therewith agrees 31 E. 3. *Voucher* 289. (d) where the case was, L. seised of 3 oxgangs of land leased by deed to C. for life, rendering rent and services, and bound himself and his heirs to warranty, &c. and afterwards granted the reversion to one R. &c. L. died, his wife brought a writ of dower against C. who vouched the heir of L. by force of the express warranty. And there Howard C. J. said, if she had two warranties, she may choose which she will; but *nota*, in both the said cases the warranty in law, and the express warranty were general. And I heard the Lord Dyer, and the whole court of Common Pleas, Hill. 14 Reg. El. resolve, that if a man makes a feoffment by deed by this word (e) *dedi*, and with express warranty in the deed, he may use the one or the other at his election. And that the statute *de Bigamis*, cap. 6. is to be intended, that (f) *dedi* imports a warranty, although the clause of warranty be not contained in the deed. The letter of which statute is, (g) *in chartis ubi continetur dedi & concessi, &c. sine clausula warrantie, ipse feoffator in vita sua, &c. sine warrantia, &c. id est quamvis nullam continet clausulam warrantie, tenetur warrantizare*: but *nota*, by force of the said act, now *dedi* is made an express warranty during the life of the feoffor: and there is great reason in the principal case, that the particular covenant subsequent, should qualify the general force of the word *demisi*, for otherwise the particular covenant would be in vain, if the force of this word *demisi* should stand; and also these words (h) *demisi & concessi* are frequent in every ordinary lease that is made; and the best (i) construction of deeds is to make one part of the deed expound the other, and so to make all the parts agree, & *quoad fieri possit* according to the true intent and meaning of the parties, *vide* 48 E. 3. 2. If a man makes a lease for *life* by this word *dedi*, and afterwards grants over the reversion, the lessor shall be vouched by force of the *dedi*. 1 Co. 2. b.

(b) Co. Lit. 384. a.

(c) Co. Lit. 384. a.

(d) Cr. El. 675.

(e) Lit. Rep. 64.

Co. Lit. 384. a.

1 Bulstr. 3.

(f) 2 Inst. 275.

276. 6 H. 7. 2. 1.

Dal. 101. pl. 35.

Cr. El. 861.

Co. Lit. 384. a.

1 Co. 2. b.

Yelv. 139.

5 Co. 17. a.

Perk. test. 124.

(g) Co. Lit. 384. a.

Pref. Roll. Abr.

pag. 7.

(h) 1 Sid. 430.

1 Vent. 44.

Hob. 12.

Cr. Jac. 73.

5 Co. 17. a. 18. a.

Cr. El. 214.

(i) Lit. Rep. 187.

2 Co. 23. b.

Co. Lit. 314. b.

384. b.

Sir ANDREW CORBET's Case.

Mich. 41 & 42 Eliz.

In the Court of Wards.

2 Bulstr. 252.
1 Jones 25.
1 Vent. 202.
2 Roll. Rep. 13.
Skin. 126, &c.
180. 263.
Fitzgib. 139.

SIR Andrew Corbet Knight, 16 Eliz. seised of divers manors, lands, and tenements in fee, part of which was held of the Queen by knights service *in capite*, by his will in writing devised some of them to Richard Corbet and others to have and hold to them and the survivor of them until such time and term as the sum of 800l. by them or the survivor of them, or the executors of the survivor of them, of the issues, rents, revenues, and profits of the said lands should be fully levied and received above all charges and expences; and the said sum so levied to be employed for the preferment of his two daughters Margaret and Mary, as in the *will* is limited, and left a third part to descend. The said Sir Andrew *anno* 20 Eliz. died, Robert Corbet his son and heir took the said *will* into his hands, and entered into the said lands now in charge, and received the profits thereof during his life, and afterwards died in *anno* 25 Eliz. after whose death, upon the search of evidences the said *will* was found at Morton Corbet, which *will* was found in the office after the death of the said Robert, and then transcribed into this court; by virtue of which *will* the said Rich. Corbet the devisee entered and hath received the profits of the said land from the Feast of St. Michael, *anno* 26 Eliz. until the Feast of the Annunciation, *anno* 36 Eliz. and by such time had levied 640l. and had employed it according to the *will*; and if the profits taken by Rob. Corbet, and which the devisees might have taken, should be accounted parcel of the said sum of 800l. was the question: and in this case 2 points were resolved. 1. That altho' the words are "until the sum of

of 800l. shall be levied by them of the profits of the land;" yet it is as much in law, as if the words had been, "shall or (a) may be levied;" and so it was held in case of a lease, (b) where the limitation of an use "until such sum shall be levied," is as much as to say "until such sum can be levied," for otherwise great mischief would ensue; for inasmuch as he in reversion or remainder cannot enter till the sum is levied, it would be in the power of them who are appointed to levy the sum, if they would defer the levying thereof, to exclude him in the reversion or remainder, from taking the profits of the land for ever, which would be inconvenient: so it was agreed upon the words of W. 2. cap. 18. *Quod* (by force of the *Elegit* which is given by the same statute) *vicecomes liberet, &c. medietatem terræ suæ quousque (c) debitum fuerit levat' per rationab' extent'*; and upon the words of the writ of Execution of a statute merchant and (d) staple, *omnia terras & tenementa, &c. habend'*, &c. *juxta form' ordinationis inde fact'*, scilicet *de mercatorib'* 13 E. 1. or 27 E. 3. *quousque sibi debitum præd' fuit satisfactum*, that if the conusee neglects to take the profits, yet when the conusee might have been satisfied his debt according to the extent, the conusor shall have his land again: but it was said that words make a plea, and therefore it was agreed, that upon the statute of Merton, cap. 6 & 7. that the profits of the land which the guardian takes for the (e) double value shall be in satisfaction of the double value, but otherwise in case of (f) single value, for the words of the said act (g) cap. 6. in case of the double value are, *Tunc teneat terram ejus ultra terminum ætatis suæ per tantum tempus quod inde possit percipere duplicem valorem maritagii*: so that by express words the profits shall be accounted parcel of the double value; but the words of the 7th chapter concerning the single value are, *sc. Si quis hæres, &c. pro domino suo noluit se maritare non compellatur hoc facere, sed cum ad ætatem pervenerit det domino suo & satisfaciatur ei, &c. pro maritagio suo antequam terram suam recipiat*, by which it appears, that the guardian shall enjoy the profits to his own (b) use, until the heir satisfies him, *vide* for this difference, 27 H. 8. 5. b. 31 Aff. 26. 43 E. 3. 21. And further it was held, that in the said case of the double value, it is in the election of the guardian, either to bring his writ of forfeiture of marriage, or to hold the land until he is satisfied, 18 E. 3. 18. acc. But if the guardian chuses to have the land, and enters into it, he shall not have the land but only so long that he might levy the double value, and his negligence shall be his own damage. *Vide* 15 E. 4. 5. b. 7 H. 6. 12. 15 H. 7. 14. 11 H. 6. 8. a. 2. It was resolved, that when the heir himself in the case at bar, (i) or he in reversion or remainder in the case of a lease, or limitation of an use enters upon him to whom the land is devised, demised, or limited, as is aforesaid,

(a) Cart. 77, 78.
1 Vent. 202.
Moor 556.
Bridgm. 82.
Noy 33.
Cr. El. 800.
(b) Bridgm. 82.
Cart. 77.

(c) Bridgm. 42.
Cart. 77.

(d) F. N. B.
131. D.

(e) Bridgm. 82.
2 Inst. 91.
(f) 2 Inst. 93.
(g) Co. Lit.
203. a.

(b) 2 Inst. 93.
6 Co. 74. b.
Co. Lit. 83.

(i) Cart. 77, 78.

- (*e*) Cart. 77, 78. and puts him out, in that case it is in the (*a*) election of such person so put out, either to bring his action and recover the mesne profits, which shall be accounted parcel of the sum, or he may re-enter and shall hold the land over until he levies the whole sum, and the time in which he was so put out, shall not be accounted parcel; for when he who is to have the land again doth the wrong, against him and all others who claim under him, he who was put out, if he will, may re-enter and hold the land, and the other shall not take advantage of his own wrong, nor compel him who was put out to bring an action against him, against his will, for the mesne profits: the same law is in the other cases, *sc.* of tenant by (*b*) *Elegit*, statute merchant, (*c*) statute staple, or guardian who holds over for the double value, if he in reversion who is to have the land again ousts him, they have such election as is aforesaid, either to hold over, or to bring their action, *vide* 15 H. 7. 14. So if the profits of the land are wasted, by drowning of water, or (*d*) wildfire, or any other act of God, without default or negligence in the party, there the devisee shall hold the land over, *vide* 11 H. 6. 7. 7 H. 7. 12. b. 15 H. 7. 14. 33 H. 8. Statute Merchant Br. 41. But if he who has such interest be ousted by a (*e*) stranger, there the time shall incur for the mischief aforesaid, and there he is put to his remedy against the trespassor. If the devisee in the case at bar, or tenant by statute staple, &c. (*f*) surrenders to him in reversion upon condition, and afterwards enters for the condition broken, he shall not hold over, for the surrender is his own act, and he cannot enlarge his interest, and therewith agrees 33 H. 8. Statute Merchant Br. 4. If tenant by *Elegit* is interrupted in taking the profits of the land, by reason of war, he shall not hold over, but it shall be in disadvantage of the tenant by *Elegit*, as it is adjudged in 19 E. 1. Execution 246. 3. It was resolved, that although the devisee had not (*g*) notice of the devise, yet if a stranger had occupied the land, the devisee ought to take notice at his peril, for (*h*) *vigilantibus & non dormientibus jura subveniunt*; and none by the law in such case is bound to give him notice, *ideo* he ought to take notice at his peril, as in case of arbitrament, (*i*) 1 H. 7. 5. & 8 (*k*) E. 4. 1. but the case at bar is stronger, because the heir himself concealed the will, and the devisee had no remedy for the mesne profits after the death of the heir, who ousted him; and where it is held in ancient books, *sc.* 34 E. 1. Gard. 129. 34 E. 1. Covenant 26. 33 H. 6. 42. 5 H. 7. 36. 7 H. 7. 12. 14 H. 7. 27. 15 H. 7. 8. F.N.B. 142. b. that the (*l*) guardian shall oust tenant for years, but not tenant for life, because tenant for life cannot hold over as lessee for years (as it was held) may: it was resolved, that the guardian shall oust neither, and therewith agrees
- (*b*) 2 Saund. 72.
Herd. 82.
(*c*) 2 Roll. 478.
(*d*) 2 Roll. 478.
Flyn 27.
15 Ed. 4. 5. b.
(*e*) 2 Roll. 478.
2 Saund. 72.
(*f*) 2 Roll. 479.
404. 2 Vent.
328. i Roll. 412.
(*g*) 1 Vent. 202.
1 Roll. Rep. 286.
2 Roll. Rep. 152.
Winch. 105.
117. 118.
Palm. 73.
Cr. Car. 577.
(*h*) Antea 10. b.
1 Sid. 55.
2 Inst. 690.
2 Co. 26. b.
Palm. 157.
3 Keb. 19.
Raym. 20.
(*i*) 8 Co. 92. b.
Br. Condit. 124.
March. Arbit.
191.
(*k*) 8 Co. 92. b.
Cr. Jac. 146.
Br. Notice 12, 18.
Fitz Arbit. 15.
Br. Arbit. 37.
March. Arbit.
192.
Futt. 81.
(*l*) Lane 35.

agrees the resolution of all the Justices in 36 H. 8. Leafes Br. 58. It was likewise resolved, that if the guardian may oust the lessee for years, yet forasmuch as his term is certain, *sc.* certain in beginning, in continuance, and in end, he cannot by any possibility hold over in such case: but in the case at bar, and in the other cases of tenant by *Elegit*, statute merchant, &c. there is no term certain, but until such a sum be by them levied, and therefore it stands with such interest, that in some case he may hold over, and so a difference. And it was said, that the words of the statute of * Marlebridge; *Salva sit nihilominus hujusmodi feoffatis actio sua, quoad terminum, seu ad feodum recuperandum, quam inde habuerint*, that is to be intended of an estate or lease made by collusion, for to that the purview of the said act extends, *sc.* that the guardian shall oust him, and in such case without question the lessee shall not hold over.

1 Jones 25.

* Marleb. cap. 6.

2 Insh. 109.

SOUTHCOTE's Case,

Pasch. 43 Eliz.

In the King's Bench.

Cr. El. 815.
3 Salk. 269.This case is de-
nied to be good
law. Comyns.
134. & 2d. Ld.
Raym. 909.(a) 1 Leon. 224.
Owen 141.
1 Roll. 338.
Cro. El. 219.
815. 10 H. 6.
21. a. Co. Lit.
89. a. Doct. &
Stud. 129. a. b.
Moor 543.
Palm. 549, 550.
(b) Co. Lit. 89. a.
(c) 1 Roll. 338.
Co. Lit. 89. a.
Palm. 550.
(d) 1 Roll. 338.
Co. Lit. 89. a.(e) Co. Lit.
89. a. b.

SOUTHCOTE brought *Detinue* against Bennet for certain goods, and declared, that he delivered them to the defendant to keep safe; the defendant confessed the delivery, and pleaded in bar, that after the delivery one J. S. stole them feloniously out of his possession: the plaintiff replied, that the said J. S. was the defendant's servant retained in his service, and demanded judgment, &c. And thereupon the defendant demurred in law, and judgment was given for the plaintiff; and the reason and cause of their judgment was, because the plaintiff delivered the goods to be safe kept, and the defendant had took it upon him by the acceptance upon such delivery, and therefore he ought to keep them at his peril, although in such case he should have nothing for his safe keeping. So if A. delivers goods to B. generally to be (a) kept by him, and B. accepts them without having any thing for it, if the goods are stole from him, yet he shall be charged in *Detinue*; for to be kept, and to be kept safe is all one. But if A. accepts goods of B. to keep them as he would keep (b) his own proper goods, there, if the goods are stolen, he shall not answer for them: or if goods are pawned or pledged to him for money, and the goods are stolen, he shall not answer for them, for there, he doth not undertake to keep them but as he keeps his own; for he has a property in them and not a custody only, and therefore he shall not be charged as it is adjudged in 29 Aff. 28. But if (d) before the stealing he who pawned them tendered the money, and the other refused, then there is fault in him, and then the stealing after such tender, as it is there held, shall not discharge him: so if A. delivers to B. a (e) chest locked to keep, and he himself carries away the key, in that case if the goods are stolen, B. shall not be charged, for

for A. did not trust B. with them, nor did B. undertake to keep them, as it is adjudged in 8 E. 2. *Detinue* (a) 59. So the doubt which was conceived upon fundry differing opinions in our books, in 29 Aff. 28. 3 H. 7. 4. 6 H. 7. 12. 10 H. 7. 26. of Keble and Fineux, are well reconciled, *vide* Braçt. lib. 2. fol. 62. b. But in accompt it is a good plea before the auditors for the (b) factor, that he was robbed, as appears by the books in 12 (22) E. 3. Accompt 111. 41 E. 3. 3 & 9 E. 4. 40. For if a factor (although he has wages and salary) does all *that* which he by his industry can do, he shall be discharged, and he takes nothing upon him, but his duty is as a servant to merchandize the best that he can, and a servant is bound to perform the command of his master: but a ferryman, (c) common inn-keeper, or carrier, who takes hire, ought to keep the goods in their custody safely, and shall not be discharged if they are stolen by thieves, *vide* 22 Aff. 41. Br. *Action sur le Cafe* 78. And the court held the (d) replication idle and vain, for *non refert* by whom the defendant was robbed, *vide* 33 H. 6. (1.) 31. a. b. If (e) traitors break a prison, it shall not discharge the gaoler, otherwise of the King's enemies of another kingdom, for in the one case he may have his remedy and recompence, and in the other not. *Nota* reader, it is good policy for him who takes any goods to keep, to take them in special manner, *scil.* to keep them as he keeps his own goods, or to keep them the best he can at the peril of the party; or if they happen to be stolen or purloined, that he shall not answer for them; for he who accepteth them, ought to take them in such or the like manner, or otherwise he may be charged by his general acceptance.

So if goods are delivered to one to be delivered over, it is good policy to provide for himself in such special manner, for doubt of being charged by his general acceptance, which implies that he takes upon him to do it.

(a) Co. Lit.
89. a. b.
Vet. Nat. Br.
59. b.

(b) Co. Lit. 89.
a. 1 Roll. 124.
Moor 462.
Doct. pla. 13.
1 Brownl. 25.

Doct. & Stud.
129. b.
(c) 1 Sid. 36.
Aley 93. Palm.
523. 2 Sand. 380.
1 Roll. 2, 124.
2 Roll. 567.
1 Roll. Rep. 79.
2 Bullstr. 280.
Cro. Jac. 262.
330. 331. Hob.
17, 18. Co. Lit.
89. a. Moor 462.
9 E. 4. 19.

1 Vent. 190,
191, 238, 239.
3 Keb. 72, 73,
74, 112, 113,
114, 135.
1 Mod. Rep. 85.
2 Mod. Rep.
270. Plowd. 9. b.
(d) 2 Bullstr.
249.

(e) 1 Roll. 808.
Dyer 66 pl. 15.
241. pl. 47. Cro.
El. 815. Palm.
550. Jenk. Cent.
231. Br. Det. 22.
Fitz. Barr. 57.

LUTTREL's Case.

Pasch. 43 Eliz. Rot. 569.

In the King's Bench.

Action on the
case.

Somerf. ff. **B**E it remembered that heretofore, that is to say, in the term of St. Michael last past, before our lady the Queen at Westminster, came Edw. Cottel, Gent. by J. Nightingale his attorney, and brought here into the court of the said lady the Queen, then there, his certain bill against George Luttrell, Esq. Robert Norcome, and John Quick, in the custody of the marshal, &c. of a plea of trespass upon the case: and there are pledges of prosecuting, to wit, John Doe and Richard Roe, which said bill follows in these words: ff. Somerset. ff. Edw. Cottel, Gent. complaineth of George Luttrell, Esq. Robert Norcome, and John Quick, being in the custody of the Marshal of the Marshalsey of the said lady the Queen, before the Queen herself, for that, viz. that whereas the said Edward, on the 4th day of May in the 41st year of the reign of the said lady Elizabeth, now Queen of England, and before, was seised of and in two ancient and ruinous fulling mills, with the appurtenances in Dunster, in the county aforesaid, in his demesne as of fee, to which said fulling mills, a great part of the water of the river in Dunster aforesaid, from a certain place called the Head Wear of the said river in Dunster aforesaid, on the said 4th day of May, in the 41st year aforesaid did run; and also before, from time whereof the memory of man was not then to the contrary, was continually accustomed and used to run; and whereas also, on the said 4th day of May, in the 41st year aforesaid and before, time out of the memory of men, for the preservation, direction, and continuing of the right course of the said great part of the water of the river aforesaid to run to the fulling mills aforesaid. a certain thick bank was made of timber and earth, near and above the said mills aforesaid. on the west part of the course of the said great part of the said water of the river aforesaid, and was near adjoining to a certain street, commonly

monly called West-street, in Dunster aforesaid: and also whereas, the said Edward being seised of the aforesaid fulling mills, with the appurtenances in the form afores. afterwards, that is to say, on the 28th day of October, in the 41st year of the said lady the Queen that now is, the said two fulling mills, (as before is said) being ruinous, did totally pull down, and afterwards, that is to say, on the 20th day of June, in the 42d year of the reign of the said lady the now Queen, at Dunster afores. in the county afores. in the places of them, and where the afores. two fulling mills before were made and built, upon the afores. great part of the said water of the river afores. two corn mills for the grinding of corn newly had built, erected and perfected, by reason whereof the said Edward then was seised, and as yet is seised of the said two corn mills (so as before is said) new built, erected and perfected, in his demesne as of fee, and the afores. great part of the water of the river afores. in Dunster afores. from the place called the Head Wear of the said river in Dunster afores. from the time of the new building, erecting and perfecting of the aforesaid his two corn mills, until the 10th day of September then next following did run: by reason whereof the said Edward, after the building of the said two corn mills, until the 10th day of September, had gotten divers gains and profits of the said people of the lady the now Queen, for the grinding of their corn at the said corn mills; yet the said George, Robert, and John, well knowing the premises, maliciously devising and intending the said Edward unjustly to molest, and him altogether to hinder and deprive of the profits of the corn mills aforesaid, at Dunster aforesaid, on the said 10th day of September, in the 43d year aforesaid, the said thick bank aforesaid, did dig and break, and the whole said great part of the aforesaid water of the river aforesaid, which to the aforesaid corn mills of the said Edward, from the said place called the Head Wear did run, and ought and used to run, from its ancient and used course, that is to say, in the said street, commonly called the West-street, in Dunster aforesaid, did divert and withdraw, whereby the said Edward, the whole profit of his corn mills aforesaid, for a great time, that is to say, from the aforesaid 10th day of September, in the 42d year aforesaid, until the exhibiting this bill, that is to say, the 20th day of November, in the 43d year of the reign of the said lady the now Queen, wholly lost, to the damage of the said Edward of 200 l. and thereof he brings his suit, &c. And now at this day, that is to say, Wednesday next after 15 days of Easter in this term, until which day the said George, Robert, and John, had licence to imparl, and then to answer, &c. before the said lady the Queen at Westminster, come as well
the

the said Edward by his attorney aforef. as the said George, Robert and John Quick, by Stephen Brodrippe their attorney, and the said George, Robert, and John, defend the force and injury, when, &c. and say, that they are not guilty thereof, and of this they put themselves upon the country; and the said Edward likewise, &c. Wherefore let a jury come before the said lady the Queen at Westminster, on Thursday, next after 15 days of the Holy Trinity, and who neither, &c. to recognize, &c. because as well, &c. the same day is given to the parties aforef. there, &c. Afterwards process was continued between the parties aforef. of the plea aforef. by the jury thereof being respited between them before the lady the Q. at Westminster, until Friday next after eight days of St. Michael then next following, unless the Justices of the lady the Queen assigned to take the assizes in the county aforef. on Thursday the 6th day of August, at the castle of Taunton in the county aforef. by the form of the statute, &c. should first come for default of jurors, &c. At which day before the lady the Queen at Westminster, come the parties aforef. by their attornies aforef. and the aforef. Justices of assize, before whom, &c. sent hither their record had before them in these words, ff. Afterwards at the day and place within contained, before Will. Periam, Knt. Chief Baron of the Queen's Exchequer, and Edw. Fenner, one of the justices of the said lady the Queen, assigned to hold pleas before the said Queen herself, Justices of the said lady the Queen, assigned to take the assizes in the said county of Somerset, by the form of the statute, come as well the said Edw. Cottel, Gent. by Adrian Street his attorney, as the within written Geo. Luttrell, Rob. Norcome, and John Quick, by Hen. Collier their attorney: and the jury whereof mention is within made, being likewise called, came, who being chosen, tried, and sworn to say the truth of the matter within contained, say upon their oath, that the said George, Robert, and John are guilty of the premises within charged upon them, as the said Edw. Cottel within against them complaineth; and they do assess the damages of the said Edward, on the occasion within written, besides his costs and charges by him about his suit in this part expended to 40s. and for those charges and costs to 5s. Therefore it is considered, that the said Edward, recover against the said George, Robert, and John, his damages aforef. by the jury in form aforef. assessed; as also 6l. for his costs to the said Edward, by the court of the lady the Queen here, with his assent of increase adjudged; which said damages in the whole, do amount to 8l. and 5s. And the said George, Robert, and John, in mercy, &c.

LUTTREL's Case.

Pasch. 43 Eliz. Rot. 596.

Between Cottel plaintiff and Luttrell defendant in an action on the case in B. R.

COTTEL brought an action on the case against Luttrell, and declared, that 4 *Martii, anno 40 Eliz.* he was seised in fee of two old and ruinous fulling mills, and that from time immemorial, *magna pars aquæ cujusdam rivuli* ran from a place called Head Wear to the said mills, and that for all the said time there had been a bank to keep the water within the current, and that afterwards the plaintiff, 8 Octob. 41 *Eliz.* pulled down the said fulling mills, and in June 42, in the place of the said fulling mills erected two mills to grind corn; and that the said water ran to the said mills till the 10th of Sept. next following, and that the same day the defendants *foderunt & fregerunt* the bank, and diverted the water from his mills, &c. The defendants pleaded not guilty, and it was found against them, upon which the plaintiff had judgment. Upon which Luttrell the defendant brought a writ of error upon the new statute in the Exchequer Chamber, and there, two errors were assigned. 1. That by the breaking and abating of the old fulling mills, and by the building of new mills of another nature, the plaintiff had destroyed the prescription, and could not prescribe to have any water-course to grist mills: as if a man grants me a water-course to my fulling mills, I cannot (as it was said) convert them to corn mills, *nec e contra*. So if I grant to one estovers to burn in his hall, he cannot convert his hall into a kitchen or malt-house: the same law of a prescription; for prescription in such case shall be intended to commence by grant, and in proof thereof they cited F. N. B. 180. H. And 7 E. 4. 27. a. if a man has estovers by grant, or appendant to an ancient house, he shall not have them to an house which he new builds: and 10 H. 7. 13. a. b. & 16 H. 7. 9. a. b. where the abbot

Hutton 58.
Carthew 215.

1 Roll. 104.
22 H. 6. 14.

27 El. cap. 2.
Cro. Car. 45.

9 E. 4. 11. a;
Co. Lit. 41. b.
3 Bulstr. 334
2 Cro. 25.
Hob. 39.

of

1 Roll. Rep. 121.

(a) Winch. 45.
Noy 127. Perk.
sect. 128, 671.
Kelw. 37. b.
(b) Noy 127.
Perk. sect. 671.

(c) Co. Lit. 83. a.
2 Roll. 513.

2 Cro. 182.
Moor 377.

of Newark granted by fine to find three chaplains in such a chapel of the conusee, and afterwards the said chapel fell, and there *tenetur* (during the time that there is no chapel) the divine service shall cease, for it ought to be done in a decent and reverend manner, and not at large *sub dio*; but there *tenetur* if the chapel is rebuilt in the same place where the old stood, then he ought to do the divine service there: but (it was collected) if it is built in another place, there the grantee is not bound to do divine service there: if there be lord and tenant, and the tenant holds to cover and repair the (a) lord's hall, as in 10 E. 3. 23. in this case if the hall falls, yet if the lord builds the hall in the same place where it was before, and of such bigness as it was before, the tenant is bound to cover it; but if it is of greater length (b) or breadth, so as prejudice may come to the tenant, or if it is built in another place, or if that which was the hall is converted to a cow-house, stable, kitchen, or the like, he is not bound to cover it, for the lord by his act cannot alter the nature of the tenure, nor of the service which the tenant ought to do: and in this case here, it might be more beneficial to him who made the original grant, and to others who had his estate to have them fulling mills, than corn mills: for perhaps they have corn mills so near, that the building of corn mills would be prejudicial to them, and it would be against reason to extend a grant or prescription to have a water-course to fulling mills, to corn mills, which is not within the purport or intention of the grant or prescription, and the grant or prescription ought to be pursued: if a man holds of another as of his manor by homage, fealty, and castle-guard, the lord aliens the manor except the castle, there the alienee shall not have (c) castle-guard; as appears by 31 E. 1. Ass. 441. And it was said, that there the alienee cannot build a new castle, for the tenure was to keep the old castle. Another objection was made, forasmuch as the plaintiff himself has broke and abated the fulling mills, although he builds new mills in the same place, and of the same nature as the old were, yet he has destroyed his prescription; for although in case when mills or houses which have water-course, or estovers, or other things appendant or appurtenant to them be overthrown by the wind, or burned by wild-fire, or fall by any other act of God, that if the owner rebuilds them in the same place, and in the same manner as they stood before, that they shall have the same ancient things appendants and appurtenants to this new mill or house, because the act of God shall not prejudice any; yet if they be erased by the party himself, or fall through his default, the ancient appendants thereby are lost; for by his own act he cannot extend the prescription or grant which was in a manner appropriated to the old

old house, to a new house: so it was objected, that if one of his own wrong, burns, or pulls down the house or mill which has such appurtenances, he shall recover all the damages; and although in such case he rebuilds the house or mill, yet he shall not have the appendances, *vide* Perkins (a) 128. b. But it was resolved, that the (b) prescription did extend to these new grist mills, for it appears by the Register, and also by (c) F. N. B. that if a man is to demand a grist mill, fulling mill, or any other mill, the writ shall be general, *de uno molendino*, without any addition of grist or fulling, 21 Ass, 23. agrees of a plaint in assise. So that the mill is the substance, and thing to be demanded, and the addition of grist, or fulling, are but to shew the quality or nature of the mill, and therefore if the plaintiff had prescribed to have the said water-course to his mill generally (as he well might) then the case would be without question, that he might alter the mill into what nature of a mill he pleased, provided always that no prejudice should thereby arise, either by diverting or stopping of the water, as it was before, and it should be intended that the grant to have the water-course was before the building of the mills, for no body will build a mill before he is sure to have water, and then the grant of a water-course being generally to his mill, he may alter the quality of the mill at his pleasure, as is afore said: so if a man has (d) estovers either by grant or prescription to his house. although he alters the rooms and chambers of this house, as to make a parlour where it was the hall, or the hall where the parlour was, and the like alteration of the qualities, and not of the house itself, and without making new chimneys by which no prejudice accrues to the owner of the wood, it is not any destruction of the prescription, for then many prescriptions will be destroyed, and although he builds new (e) chimney, or makes a new addition to his old house, by that he shall not lose his prescription, but he cannot employ or spend any of his estovers in the new chimneys, or in the part newly added; the same law of conduits and (f) water-pipes, and the like: so if a man has an old window to his hall, and afterwards he converts the hall into a parlour or any other use, yet it is not lawful for his neighbour to stop it, for he shall prescribe to have the light in such part of his house: and although in this case the plaintiff has made a question, forasmuch as he has not prescribed generally to have the said water-course to his mills generally, but particularly to his fulling mills, yet forasmuch as in general the mill was the substance, and the addition demonstrates only the quality, and the (g) alteration was not of the substance, but only of the quality, or the name of the mill, and that without any prejudice in the water-

(a) Perk. sect. 671, 672.
(b) Hutt. 58.
Godb. 237.
Winch. 45.
Poph. 172. Hob.
39. Cro. Jac.
182. Moor 877.
(c) F. N. B. 2. c.
212. b. Reg.
Orig. 2. a. Cro.
Jac. 557.

(d) Co. Lit. 41. b.
2 Leon. 45.
4 Leon. 241.

(e) Hob. 39.
1 And. 151.
2 Leon. 45.
4 Leon. 241.
Godb. 97.
1 Bulstr. 94.
(f) 1 Sid. 167.
291. 1 Vent.
237.

(g) Cro. Jac.
182.

(a) Godb. 237.
Winch. 45.
Hutton 58.
Poph. 172.
Hob. 39. a.
Cro. J2c. 182.
Moor 877.
4 Co. 38.
(b) 21. E. 4. 59. a.
3 Co. 74. a.
1 Sand. 344.
Moor 581.
3 Lev. 233.

(c) Co. Lit. 4. a.
2 Roll. Rep. 265.
Palm. 320.
2 Roll. 57.
Owen 75.
Moor 360.
2 And. 123, 124.
Cr. El. 658.
476, 477.
Godb. 352.

(d) 2 Rol. Rep.
265.

(e) Perk. sect.
671.

water-course to the owner thereof; for these reasons it was resolved, that the (a) prescription remained. If a corporation have franchises or privileges by grant or prescription, and afterwards they are incorporated by another name, as where they were Bailiffs and Burgessees before, now they are Mayor and Commonalty; or Prior and Convent before, and afterwards they are translated into a Dean and Chapter, although in these cases the quality and name of their corporation are (b) altered and changed, and chiefly in the case of Prior and Convent, for from regular who are dead persons in law they are made secular, yet the new body will enjoy all the franchises, privileges, and hereditaments which the old corporation or body politic had either by grant or prescription, for no person will be prejudiced thereby; *vide* 14 H. 6. 12. 37 Aff. 6. 38 Aff. 22. 39 H. 6. 15. Another reason was added that when a man has any thing appendant or appurtenant to an house or mill, the most perdurable part of it is the land in which the foundation is, and upon which the whole fabrick of it consists, and in respect thereof, by grant of all his (c) lands, all his houses, mills, and woods will pass. And so it was resolved, as Popham C. J. said, by Wray and Dyer Chief Justices, upon conference had with divers other Justices upon a case referred to the said Chief Justices: for in *præcipe*, where an house, mill or wood is demanded, the warrant of attorney is in *placito terræ*: and in case of voucher, when judgment is given for the tenant to have in value against the vouchee, the judgment is *quod habeat de terris* of the vouchee *ad valentiam*, yet thereby he shall have houses, mills, woods, &c. and in special cases by recovery of lands, a man shall recover houses, as it is held by some 4 E. 3. 161. 6. E. 3. 283. 2 E. 3. 37. Plow. Com. 168. 8 E. 3. 377. Dyer 28 H. 8. 47. and therewith agrees the civil law; for (d) *appellatione fundi, omne ædificium & omnis ager continetur*. Then the prescription or grant shall respect the most durable part, and which in judgment of law includes the whole. And therefore it was resolved that although the house or mill falls by the act or default of the owner, or by the wrong of another, yet forasmuch as the perdurable part, and which includes the whole, remains, he may rebuild it without any loss of any appendant or appurtenant to it, but it ought to be upon the same place which was the old foundation of the old house: for as *that* supported and in judgment of law included the old house when it stood, so it shall support and include the new house, and so in a manner is a continuance of the old house; and so the *quære* which Perkins makes fol. 128. (e) well resolved And so it was said in all the cases of estovers and tenures aforesaid, when the alteration of the quality
or

or name of part of the house doth not cause any prejudice to the terre-tenant, the estovers and services remain: *et nota* reader, a case reported, by Serjeant Bendloes, Mich. 3 H. 8. Rot 649 *in communi banco* in *repl'* brought by Sir William Capel (a) against Robert Apprice and others, of four horses taken in a place called Old Hadham Park, in Little Hadham in the county of Hertford; the defendants made consens as Bailiffs to Richard Bishop of London because Sir Thomas Brand, Knt. was seised of the manor of Little Hadham in fee, whereof the place where, &c. was parcel, and held it of the Bishop of London, *ut de castro suo de Stortford in com' præd' per homagium, fidelitatem, & ad (b) scutagium domini Regis 21 s. cum acciderit, & ad plus plus, & ad minus minus, & per redditum, v s. pro ward' castri præd' ad festum Sancti Michaelis Archangeli annuatim solvend', ac per redditum xiii s. iv d. pro auxilio vicecom'* "at four feasts of the year, &c." And for 15 s. for castle-guard behind for three years, &c. they avowed the taking of one of the said four horses, and for 40 s. for aid of the Sheriff behind also for three years, they avowed the taking of the other three horses. The plaintiff in bar of the avowry as to the taking of one horse for castle-guard said, that before the beginning of the said three years, *castrum præd' funditus corruit & penitus in decasum extitit, & adhuc existit, & hoc paratus est verificare, unde petit iudicium si præd' Rich. Apprice, &c. pro aliquo redditu pro wardo castri præd' sic obruti & penitus in decasum existen', cap' præd' unius equi justam cognoscere debet, &c.* Upon which it was demurred in law, and as to the aid of the Sheriff it was also demurred in law: and in that case it was resolved, that although the castle is † ruined and decayed, (c) yet the rent remained; for when the tenant holds of the lord to ward or repair the lord's castle, and afterwards such service (as Lit. says in the case of Soccage) was in ancient time changed by mutual consent of the lord and tenant into an annual rent, yet it is said, that such rent is paid *pro wardo castri, id est*, in satisfaction *wardi castri*: for in this case, and such like, (*pro*) signifies full and perpetual recompence and satisfaction, and not conditional, or satisfaction temporary, *sc.* for a time, so that the lord may have the castle-ward when he will, for the seisin of the rent is not seisin of the castle-guard in such case: but if the tenant holds to guard the lord's castle, if the castle falls, the service (d) is suspended until it is rebuilt, (e) but then the tenure shall not be in such case alledged to be by the rent, but by the castle guard, neither shall the avowry be made as in the case at bar it is for the rent, but for the castle-guard: *vide* Lit. 26. b. that if a man holds his land by certain rent for castle-guard, Lit. says, that such tenure is tenure in (e) soccage, which cannot be if the castle-guard remains, for then

(a) Moor 1, 2.
Co. Lit. 83. a.
Dav. 3. a. b.
N. Benl. 9, 10.
Lit. Rep. 48.

(b) Co. Lit. 72. b.

† 1 Mod. Rep.
200.
(c) Dav. 3. a. b.
Moor 2.
Co. Lit. 83. a.
N. Benl. 10.

(d) Co. Lit. 83. a.

(e) Co. Lit. 97.
a. b. 6. Co. 20.
a. F. N. B. 83.
256.

(a) Co. Lit. 82 b.
87. b. F. N. B.
83. c. Lit. sect.
321.

(b) N. Benl. 10.
Moor 2.
Davis 3.

(c) Co. Lit. 5. a.

(d) Plowd. 163.
b. 169. b. Br.
Comprise 18.
Fitz. Bar. 143.
Br. præcipe
quod reddat 23.

(e) Co. Lit. 13. a.
Dav. 3. a. b.
Moor 2.
N. Benl. 10.

(f) Palm. 504.
Cr. Jac. 324.
2 Roll. 80.
2 Bullstr. 10.

the tenure shall be by knight's service, for Littleton saith, that where the tenant ought by himself or by another to do castle-guard, that such tenure is tenure by (a) knight's service, so the difference between rent for castle-guard, and service to guard the castle. The same law if the tenant holds of his lord by certain rent for work-days, or any other service. And Sir William Capel the plaintiff perceiving the opinion of the court against him for both points, was nonsuited, and both the rents as the said serjeant reports, are paid (b) to this day: and when a man holds of another in soccage, or otherwise as of his castle, and afterwards the castle falls, and is utterly ruined, yet the tenure remains; for it must be known that when any tenure is of any person as of a castle, in such case the castle includes in itself a manor, for (c) *castrum* as a manor *est nomen generale & collectivum*, and may include in itself divers things, *sc.* demesnes and services, &c. 5 H. 7. 9 a. Land may be parcel of a (d) castle, *vide* 29 H. 6. Traverse 4. That an hundred may be as well parcel of a castle as it may be of a manor, as it is held in 8 H. 7. 1. And therefore when a tenure is of any as of his castle (which always in such case includes in itself a manor) although the castle is ruined, yet the tenure remains without question: *vide* 19 E. 2. Aff. 399. Divers tenants held of another as of his manor by fealty and suit to the lord's mill, the lord aliened the mill, with the suit of the tenants, and afterwards the vendor died, and his son entered, and conceiving that the tenants who held of his manor could not do suit to him who had not the manor, of himself made a new mill elsewhere upon other parcel of his demesnes, and had the suit to his own mill which the vendee ought to have had; for no man can have suit to his mill by reason of tenure, if it were not of corn growing in certain land, and that within his seignory: *vide* 17 E. 3. (67) 97. 29 E. 3. 12. 16 E. 3. Avowry 92. And by the said case it appears, that although the ancient mill is aliened, or if it falls, the lord may erect a new mill in another place within his manor, for the tenure in such case is to do suit to the lord's mill generally, and not to any particular mill; *nota bene* all these differences. Another error was assigned because the prescription was, that *magna pars* (f) *aquæ cujusdam rivuli*, &c. that it was incertain how much water should be comprehended within these words, *magna pars aquæ*; and declarations, and especially in actions on the case, ought to be certain, and the whole case ought to be shewed in certain, and if the truth is that one and the same river before it comes to the mills divides itself into two branches, whereof one

only

only runs to the mills, the better form was to prescribe to have *aquæ cursum* to the said mills, for each of the branches *est aquæ cursus*; *quod fuit concessum* as to this point; but it was resolved, that although the declaration might have had a better form, yet in substance it was good, for it was not possible to shew how much water runs to mills, and the quantity (a) of the water is not material, forasmuch as the defendant, by the breaking of the bank, diverted the water which ran to the said mills; *vide* 8 El. Dyer 248. b. (b) where in an action on the case the plaintiff declared that the defendant *divertit multum cursus aquæ*; and another precedent is there cited between Wikes and Searle, that an assise of nuisance was brought *pro diversione majoris partis cursus aquæ*, by which the judgment given by Sir John Popham, Chief Justice, and his companions, Justices of the King's Bench, was affirmed. *Nota* well this case was adjudged by both the courts, (*i. e. B. R. & Cam. Stac.*)

Cro. Car. 499,
500.

(a) Doct. pl. 86.

(b) Cr. Jac. 324.

2 Bulst. 119, 196.

Dyer 248. pl. 80.

1 Leon. 273.

2 Roll. 143.

1 Bulst. 47.

D R U R Y's Case.

Trin. 43 Eliz.

In the King's Bench.

Moor 561, 562.
1 And. 201.
Cr. El. 723,
724, 839.
Jenk. Cent.
272, 273.

(a) Moor 561.
Antea 78. b.

DRURY brought a writ of error on a judgment given in the Common Pleas in a *Quare impedit* brought by the Queen, where the case was; a Countess being a widow, retained two chaplains, and afterwards retained a third, which third first purchased a dispensation to have two benefices with cure, and accordingly was advanced to two with cure, and whereof the first was above the yearly value of 8l. And if he was lawfully qualified within the statute of 21 H. 8. cap. 13. was the question in the Common Pleas: for if he was lawfully qualified, then the first benefice by the acceptance of the second was not void, & *per consequens*, no title to present by lapse devolved to the Queen; and by the pleading, it doth not appear that the two first chaplains were living at the time when the third was advanced, for it was averred only, that the two were alive at the time when the third was retained; upon which great question arose in the King's Bench: and it was adjudged in the Common Pleas, that title to present by lapse was devolved to the Queen, and therefore judgment was given there accordingly. And after many arguments at bar and bench upon the writ of error in the King's Bench, the judgment given in C. B. for the Queen was affirmed. And in this case two points were resolved: 1. When the Countess retained two chaplains; these two are capable of a dispensation, according to the act of (a) 21 H. 8. by which it is provided, "that every Countess, being a widow, may have two chaplains, whereof every one may purchase licence or dispensation." Then when she retains two, the statute is executed, for she cannot have more than two capable to have dispensation, and the retainer of the third cannot

not divest the capacity of dispensation which was vested by their retainer in the first two; for although the countess might have as many chaplains as she would at the common law, yet she cannot have more than two capable of a dispensation by force of the statute; and reason requires that he who has served longest should be first preferred, & (a) *qui prior est tempore, potior est jure*. And so now this point has been four times adjudged: 1. In the Common Pleas, *Pasch. 31 Eliz. Rot. 728.* in a *Quare impedit* between the Queen and the Bishop of Lincoln, the President of Maudlin college, and John Skuffling, (b) clerk. 2. In the Lady St. John's case. 3. In this very case in the Common Pleas: and 4thly, now in the King's Bench; *vide Dyer 312.* (c) by the opinion of Catlyn, Saunders, and Dyer, if a Lord who is allowed but three chaplains, retains six by his letters testimonial, at one and the same time, and all six are preferred to six several pluralities, the three who are first promoted, are warranted by the statute, and yet the retainer was not according to the statute, but in *æquali jure* (d) *melior est conditio possidentis*. 2. It was resolved, that when the two first were retained according to the statute, and thereby the statute executed as aforesaid, the retainer of the third, although it was good at the common law, yet it was void to give him capacity to purchase dispensation within the statute; and therefore although the other two were dead before the advancement of the third, yet soasmuch as they were alive at the time of his retainer, which retainer was at the common law, and not according to the statute, therefore he ought to have a new retainer after their death, and before his advancement, for *quod* (e) *ab initio non valet, in tractu temporis non convalescet*; as if the son and heir apparent of a Baron retains a chaplain, and gives him his letters under his hand and seal, and afterwards his father dies, and this chaplain purchases dispensation, this retainer and these letters will not serve him, because they were not available at the beginning; and if a Baron retains three chaplains according to the statute, and they purchase dispensation, and are advanced according to the statute, now if the Lord discharges one of them from his service, he cannot retain another during his life, for then by such means he might advance infinite chaplains without number, by which the statute would be defrauded, for the statute

(a) Co. Lit.
24. a. 347. b.
2 Inst. 95.

(b) Postea 118. a.
Moor 277.
1 And. 201.
Cr. El. 724.
Sav. 101, 102.
(c) Cr. El. 724.
Dy. 312. pl. 83.
Moor. 440.

(d) Vaugh. 60.

(e) 4 Co. 2. b.
Hutt. 51.
Cawly 214.
2 Co. 55. b.
Cr. El. 585.
Co. Lit. 35. a.
10 Co. 62. a.
8 Co. 135. b.
Dav. 32. a.
2 Bulst. 304, 305.
3 Bulst. 192.
Jenk. Cent. 272.

(a) 1 And. 200.
201.
Godb. 41, 42.
Owen 51.
Sav. 79.

limits him to three only to have benefit of the act: and so was it adjudged in the Common Pleas, *Pasch. 28 Eliz. Rot. 1130.* in a *Quare impedit* between the Queen and the Bishop of Gloucester, and Edward (a) Savacre, and affirmed by a writ of error in the King's Bench; and it was said, that the said act of 21 H. 8. shall be taken strictly against pluralities, and therefore it has been held, that if a Baron, who by the statute may retain three chaplains, is made Warden of the Cinque Ports, who may have a chaplain in respect of his office, yet he shall have but three. And so if a Baron has three, and is made an Earl, yet he shall have but five in all, & *sic de cæteris*.

Tanfield and others were of counsel with the plaintiff in the writ of error, and the Attorney and others with the defendant.

S L A D E's Case.

Hill. 38 Eliz. Rot. 305.

In the King's Bench.

Devon, ff. **B**E it remembered that heretofore, that is to say, in the term of St. Michael last past, before the lady the Queen at Westm. came John Slade, by Nich. Weare his attorney, and brought here into the court of the said lady the Queen, then there, his certain bill against Humphry Morley, in custody of the Marshall, &c. of a plea of trespass upon the case: and there are pledges of prosecuting, to wit, John Doe and Richard Roe, which said bill followeth in these words: ff. Devon, ff. John Slade complaineth of Humphrey Morley, being in custody of the Marshal of the Marshalsea of the lady the Q. before the Q. herself, for that, that is to say, that whereas the said John, the 10th day of Nov. in the 36th year of the reign of the said lady Elizabeth, now Q. of England, &c. was possessed for the term of divers years then and yet to come, of and in one close of land, with the appurtenances in Halberton, in the county aforesaid, called Rack Park, containing by estimation eight acres, and being so possessed thereof, the said John afterwards, that is to say, on the said 10th day of Nov. in the 36th year aforesaid, had sowed the said close with wheat and rye, which wheat and rye in the close aforesaid, by the said John (so as before is said) being sowed, afterwards that is to say, on the 8th day of May, in the 37th year of the reign of the said lady the now Queen, were grown into ears, the said Humphrey, on the aforesaid 8th day of May in the said 37th year aforesaid, the said wheat and rye in ears upon the close aforesaid (as before is said) then growing, at Halberton aforesaid, in consideration that the said John then and there, at the special instance and request of the said Humph. had bargained and sold unto the said Humph. to the use and behoof of the said Humph. all the ears of wheat and corn which then did grow upon the said close, called Rack Park (the tithes thereof to the Rector of the church of Halberton aforesaid due only excepted) did assume, and then and there faithfully promised, that he the said Humph. 16l. of lawful money of Engl. to the afores. John in the feast of St. John the Baptist, then next following, would well and truly content and pay: yet the said Humph. his assumption and promise

aforesaid little regarding, but endeavouring and intending the said John of the aforesaid 16 l. in that part subtilly and craftily to deceive and defraud, the said 16 l. to the said John, according to his assuming and promise, hath not yet paid, nor any way for the same contented him, although the said Humph. thereunto afterwards, that is to say, on the last day of Sept. in the 37th year of the reign of the said lady the now Q. afores. at Halberton aforesaid, by the said John was oftentimes thereunto required, but the same to pay him, or any way to content him, hath altogether refused, and doth yet refuse; whereupon the said John saith he is injured, and hath sustained damage to the value of 40 l. and thereof he bringeth suit, &c. And now at this day, that is to say, Friday next after 8 days of St. Hilary, in the same term, until which day aforesaid the said Humph. had licence to imparl to the bill aforesaid and then to answer, &c. before the lady the Q. at Westm. cometh as well the said John by his attorney aforesaid, as the said Humph. by John Halstaff, his attorney; and he the said Humph. doth defend the force and injury when, &c. and saith, that he did not take upon himself in manner and form, as the said John Slade hath complained against him; and upon this he putteth himself upon the country; and the said J. Slade likewise, &c. Therefore let a jury come before the said lady the Q. at Westm. on Thursday next after eight days of the Purification of the blessed Mary, &c. and who neither, &c. to recognize, &c. and because as well, &c. The same day is given to the parties aforesaid there, &c. Afterwards process was continued between the parties aforesaid of the plea afores. by the jury thereof being respited between them before the lady the Q. at Westm. until Wednesday next after 15 days of Easter then next following, unless the Justices of the lady the Q. assigned to take assizes, first upon Monday the 2d week of Lent, at the castle at Exeter, in the county aforesaid by the form of the stat. &c. shall come, for default of jurors, &c. At which Wednesday before the lady the Q. at Westm. aforesaid came the parties aforesaid by their attornies aforesaid. And the before said Justices of assizes, before whom, &c. sent here their record before them had in these words. ff. Afterwards at the day and place within mentioned, before Thomas Walmesley one of the Justices of the Q. of the Bench, and Edw. Fenner, one of the Justices of the said lady the Q. assigned to hold pleas before the Q. herself, Justices of the said lady the Q. assigned to take assizes in the county aforesaid, by form of the stat. &c. come as well the within named J. Slade, by T. Clayton his attorney, as the within written Humph. Morley, by Henry Collier his attorney and the jurors sworn, whereof mention is within made likewise, being called, came, who to say the truth of the matter within contained, being chosen, tried and sworn; say upon their oath, that the said Humph. Morley did buy of the said J. Slade the within written wheat and rye, in ears, upon the within written close (as is said before) growing being, for 16 l. of good and lawful money of England,

to be paid to the said J. Slade in the Feast of St. John the Baptist, then next following, as in the declaration within written is within specified: and further the said jurors say, upon their oath afores. that betwixt the said J. Slade, and the said Humph. Morley, there was no promise or taking upon him, besides the bargain afores. But whether upon the whole matter afores. by the said jurors in form afores. found, the said Humph. Morley did take upon him in manner and form, as in the declaration within written, within specified, or no, the said jurors are altogether ignorant, and thereof they ask the advice and consideration of the court here, &c. and if upon the whole matter afores. by the said jurors in form afores. found, it shall seem to the Justices of the court here, that the said Humph. Morley did take upon him in manner and form, in the declaration within specified, then the said jurors say upon their oath afores. that the afores. Humph. Morley did take upon him in manner and form as the afores. J. Slade within against him complaineth; and then they do assess the damages of the said J. Slade, by occasion of not performance of his promise, and taking upon him within written, besides his charges and his costs in the suit afores. by him expended to 16l. And for those charges and costs to 20s. And if upon the whole matter by the said jurors, in form afores. found, it shall seem to the said Justices and court here, that the said Humph. Morley did not take upon him in manner and form in the declaration within specified, then the said jurors say upon their oath, that the said Humph. did not take upon him in manner and form as the said Humph. hath within alledged: and because the court of the lady the Q. here of giving their judgment of and upon the premises are not yet advised, day is given to the parties afores. in state as now it is, before the lady the Q. at Westm. until Monday next after 15 days of the Holy Trinity to hear their judgment of and upon the premis. because the court of the lady the Q. here thereof are not yet, &c. And so from term to term, until Saturday next after eight days of St. Michael, to hear their judgment of and upon the prem. because the court of the lady the Q. here are not yet, &c. At which day before the lady the Q. at Westm. afores. came the parties afores. in their proper persons: upon which all and singular the premises being seen by the court of the lady the Q. and fully understood, and mature deliberat. being thereupon had, for that it seemeth to the court of the said lady the now Q. here, that the said Humph. did take upon him in manner and form in the declaration afores. above specified: it is considered, that the afores. J. Slade do recover against the said Humph. Morley his damages and costs afores. by the jurors afores. in form afores. assessed, as also 9l. for his charges and costs afores. to the said J. Slade, by the court of the said lady the Q. here by his assent of increase adjudged, which damages in the whole do amount to 26l. And the said Humph. Morley in mercy, &c.

S L A D E ' s Cafe.

Trin. 44 Eliz.

In the King's Bench.

Yelv. 20. S. C.
Moor 433, 667.

JOHAN SLADE brought an action on the case in the King's Bench against Humfrey Morley, (which plea began Hil. 38 Eliz. Rot. 305.) and declared, that whereas the plaintiff, 10 Nov. 36 Eliz. was possessed of a close of land in Halberton in the county of Devon called Rack Park, containing by estimation eight acres for the term of divers years then and yet to come, and being so possessed, the plaintiff the said 10th day of Nov. the said close had sowed with wheat and rye, which wheat and rye, 8 *M.iii*, 37 Eliz. were grown into blades, the defendant, in consideration that the plaintiff, at the special instance and request of the said Humphrey, had bargained and sold to him the said blades of wheat and rye growing upon the said close (the tithes due to the Rector, &c. excepted) assumed and promised the plaintiff to pay him 16l. at the feast of St. John the Baptist then to come: and for non-payment thereof at the said feast of St. John Baptist, the plaintiff brought the said action: the defendant pleaded *Non assumpsit modo & forma*; and on the trial of this issue the jurors gave a special verdict, *sc.* that the defendant bought of the plaintiff the wheat and rye in blades growing upon the said close as is aforesaid, *prout* in the said declaration is alledged, and further found, that between the plaintiff and the defendant there was no other promise or assumption but only the said bargain: and against the maintenance of this action divers objections were made by John Doddridge of counsel with the defendant. 1. That the plaintiff upon this bargain might have ordinary remedy by action of debt, which is an action formed in the Register, and therefore he should not have an action on the case, which is an extraordinary action, and not limited within any certain form in the Register; for *ubi cessat remedium ordinarium, ibi decurritur ad extraordinarium, & nunquam decurritur ad extraordinarium ubi valet ordinarium*, as appears by all our books; *Et nullus debet agere actionem de dolo, ubi alia actio subest*. The second objection was, that the maintenance

Hard. 65.

nance of this action takes away the defendant's benefit of (a) (a) Co. Lit. 295. a. wager of law, and so bereaves him of the benefit which the law gives him, which is his birthright. For peradventure the defendant has paid or satisfied the plaintiff in private betwixt them, of which payment or satisfaction he has no witness, and therefore it would be mischievous if he should not wage his law in such case. And that was the reason (as it was said) that debts by simple contract shall not be (b) forfeited to the King by outlawry or attainder, because then by the King's prerogative the subject would be ousted of his wager of law, which is his birthright, as it is held in 40 E. 3. 5. a. 50 Aff. 1. 16 E. 4. 4. b. & 9 Eliz. Dyer 262. and if the King shall lose the forfeiture and the debt in such case, and the debtor by judgment of the law shall be rather discharged of his debt, before he shall be deprived of the benefit which the law gives him for his discharge, although in truth the debt was due and payable; *a fortiori* in the case at bar, the defendant shall not be charged in an action in which he shall be ousted of his law, when he may charge him in an action, in which he may have the benefit of it: and as to these objections, the courts of King's Bench and Common Pleas were divided; for the Justices of the King's Bench held, that the action (notwithstanding such objections) was maintainable, and the court of Common Pleas held the contrary. And for the honour of the law, and for the quiet of the subject in the appealing of such diversity of opinions (*Quia nil in lege intolerabilius est eandem rem diverso jure censeari*) the case was openly argued before all the Justices of England, and Barons of the Exchequer, *sc.* Sir John Popham, Knt. C. J. of England, Sir Edm. Anderson, Knt. C. J. of the Common Pleas, Sir W. Periam, Ch. Baron of the Excheq. Clark, Gawdy, Walmesley, Fenner, Kingmill, Savil, Warburton, and Yelverton, in the Exchequer Chamber, by the Queen's Attorney-General for the plaintiff, and by John Dodderidge for the def. and at another time the case was argued at Serjeant's Inn, before all the said Justices and Barons, by the Attorney-General for the pl. and by Fran. Bacon for the def. and after many conferences between the Justices and Barons, it was resolved, that the action was maintainable, and that the pl. should have judgment. And in this case these points were resolved: 1. That altho' an action of debt lies upon the contract, yet the bargainer may have an action on the case, * or an action of debt at his election †, and that for three reasons or causes; 1. In respect of infinite precedents (which George Kemp, Esq. Secondary of the Prothonotaries of the King's Bench shewed me) as well in the court of Common Pleas as in the court of King's Bench, in the reigns of King H. 6. E. 4. H. 7. & H. 8. by which it appears, that the plaintiffs declared that the defendants, in consideration of a sale to them of certain goods, promised to pay so much money, &c. in which

(b) Postea 95. a. Moor 204. 106. 2 Roll. 806. Cr. El. 203, 575, 851. 1 Roll. 912. Stamf. Cor. 183. a. Dy. 262. pl. 31. Cr. Car. 187. 2 Vent. 282. Hard. 226. Went. 23. Noy 155, 176. 1 Leon. 64.

* 1 Salk. 9. † 5 Co. 88. 9 Co. 51, 72. (c) Yelv. 20. Moor 433, 667. Vaugh. 101. 2 Roll. Rep. 292, 464. 3 Bulstr. 237. Cr. Car. 527, 540. Cr. El. 454. 756. 1 Mod. Rep. 163. Dyer 21. pl. 125. 2 Sid. 169. Noy 53. Moor 694.

cases the plaintiffs had judgment. To which precedents and judgments being of so great number, in so many successions of ages, and in the several times of so many reverend Judges, the Justices in this case gave great regard; and so the Justices in ancient times, and from time to time did, as well in matters of form as in deciding of doubts and questions as well at the common law, as in construction of acts of parliament, and therefore in 11 E. 2. Formedon 32. it is held, that the ancient forms and manner of precedents are to be maintained and observed; and in 34 Ass. 7. that which has not been according to usage shall not be permitted, and in 2 E. 3. 29. the ancient form and order is to be observed. In 39 H. 6. 30. the opin. of *Prifot' & tot' cur'* was, that in a writ of mesne the pl. ought to surmise the tenure between the lord paramount and the mesne, as well as between the mesne and the tenant, and shew the divers reasons and causes of their opinions, but when the Justices were informed by the Prothonotaries, that the book called *Les Tales*, contained the form that had always in such cases been used, the book saith, that the Justices resolved that they would not change the usage, notwithstanding their opinion was to the contrary, and according to the precedent they awarded the count good, 4. E. 4. 44. In a writ of error brought by John Paston, to reverse an outlawry against him, he did not surmise in the writ at whose suit he was outlawed, and all the Justices said it was a strange writ, and no certainty supposed thereby; for by the writ it did not appear whether he was outlawed at the suit of the party or at the King's suit, or in what suit, or for what thing, and it might be that he was outlawed for felony, debt, trespass, account or fine to the King, but when the court was informed that the ancient form was such, then they changed their opinion and awarded the writ good, and resolved, that common course makes a law, altho' now as it was there said, perhaps reason willeth the contrary; but there the Justices said, we cannot change the law now, for that would be inconvenient, and therewith agrees Long 5. E. 4. 1. where it is said, that the course of a court makes a law: *Vide Mich. 2 & 3 P. & M. 120.* The stat. of W. 2. cap. 12. *Quod justic' coram quib' format' erit' appellum & terminat'* shall enquire of damages where the def. is acquitted, yet precedents expound the law against the express letter, *sc.* that Justices of *Nisi Prius* (before whom the appeal was not began) shall do it, and many others to this effect are in our books; but forasmuch as precedents are not always allowable, for in our books the Judges reject some precedents, see a notable case in Long 5 E. 4. 110. for certain rules and differences in this matter there it is agreed, that where a question was of a return of an assise, and 2 or 3 preced. were shewed, which agreed with the said return, and the Justices said, that 2 or 3 returns or precedents do not make a law, nor a custom, especially when there are here in court forty and more precedents to the contrary; but if there was no precedent to the contrary, it was another matter,

ter, unless the court adjudge it against reason, and then it shall be amended, for perhaps the (a) precedents passed without (b) challenge of the party, or debate of the Justices, as then (as it is there recited) of late it was in a writ of error to reverse an outlawry in the county of Lancaster, and the error was because the Sheriff returned, that *ad com' Lancastriae tent' ibid'*, &c. where it should be, *ad com' Lancastriae tent' apud Lancast'*, or other certain place to which this word *ibid'* should have relation, and although there were shewed 100 precedents according to the said return, yet the outlawry was reversed; so that in divers cases precedents do not make a law; and therefore it was said by the Justices to the parties, that he who would have advantage of precedents, ought to search for them at his peril, and for his speed, for the court would not search for them; for if none, or no usual precedents are shewn, the court ought to adjudge according to law and reason: out of which book, 1. It is to be observed, that two or three, or such small number of precedents, do not make a law against the generality of precedents in such case. 2. That the return of Sheriffs or entries of clerks without challenge of the party, or consideration of the court, being against common law and reason, are not allowable: but when the precedents are (c) judicial, *sc.* where the Justices, by divers succession of ages, have given judgment in actions there brought, it shall be intended that some of the counsel with the defendant, or some of the Justices before whom the action was tried, and the record read, would have excepted against it, if in their judgment the action was not maintainable, but in case of return of an outlawry, or entries of clerks, the records pass in silence, and without exception of the parties, and therefore are not so authentic as judgments upon demurrers or verdicts, and therefore in such cases (d) *multitudo errantium non parit errori patrocinium*, if such returns or entries of clerks and officers are clearly in the opinion of the Justices against law and reason: so that in the case at bar it was resolved, that the multitude of the said judicial precedents in so many successions of ages, well prove that in the case at bar the action was maintainable. The second cause of their resolution was divers judgments and cases resolved in our books where such action on the case on Ass. has been maintainable, when the party might have had an action of debt, 21 H. 6. 55. b. 12 E. 4. 13. 13 H. 7. 26. 20 H. 7. 4 b. & 20 H. 7. 8. b. which case was adjudged as Fitz James cites it, 22 H. 8. Dyer 22. b. 27 H. 8. 24 & 25. in Tatam's case, Norwood and Read's case adjudged Plowd. Com. 180. 3. It was resolved, that every contract (e) executory imports in itself an *assumpsit*, for when one agrees to pay money, or to deliver any thing, thereby he assumes or promises to pay, or deliver it, and therefore when one sells any goods to another, and agrees to deliver them at a day to come, and the other in consideration thereof

(a) 2 Co. 61. b.
6 Co. 52. b.
1 Sid. 114.
1 And. 49.
1 Jones 424.
Vaugh. 419.
Hard. 340.
(b) Winch. 85.
1 Roll. Rep. 75.
Lit. Rep. 125.
Hard. 98.

(c) Cr. Arg. 75.
2 Roll. Rep. 75.
Hard. 98, 355.
141.

(d) Cr. Arg. 75.
Hard. 98.

(e) Yelv. 20.
Moor 667.

thereof agrees to pay so much money at such a day, in that case both parties may have an action of debt, or an action on the case on *assumpsit*, for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case, as well as actions of debt, and therewith agrees the judgment in Read and Norwood's case, Pl. Com. 128. 4. It was resolved, that the plaintiff in this action on the case on *assumpsit* should not recover only damages for the special loss (if any be) which he had, but also for the whole debt, so that a recovery or bar in this action would be a good * bar in an action of debt brought upon the same contract; so *via versa*, a recovery or bar in an action of debt, is a good bar in an action on the case on *assumpsit*. *Vide* 12 E. 4. 13. a. 2 R. 3. 14. (32) 33 H. 8. *Action sur le case*. Br. 105. 5. In some cases it would be mischievous if an action of debt should be only brought, and not an action on the case, as in the case *inter* Redman and Peck, 2 & 3 Ph. & Mar. Dyer 113. they bargained together, that for a certain consideration Redman should deliver to Peck 20 quarters of barley yearly during his life, and for non-delivery in one year, it is adjudged that an action well lies, for otherwise it would be mischievous to Peck, for if he should be driven to his action of debt, then he himself could never have it, but his executors or administrators, for debt doth not lie in such case, till all the days are incurred, and that would be contrary to the bargain and intent of the parties, for Peck provides it yearly for his necessary use: so 5 Mar. Br. *Action sur le case* 108. that if a sum is given in marriage to be paid at several days, an action upon the case lies for non-payment at the first day, but no action of debt lies in such case (a) till all the days are past. Also it is good in these days in as many cases as may be done by the law, to oust the defendant of his law, and to try it by the country, for otherwise it would be occasion of much perjury. 6. It was said, that an action on the case on *assumpsit* is as well a formed action, and contained in the register, as an action of debt, for there is its form: also it appears in divers other cases in the Register, that an action on the case will lie, although the plaintiff may have another formed action in the Register, F. N. B. 94. g. & Register 103. b. If a man has a manor within any honour, and has a leet within his manor of his tenants, if he or his tenants are distrained by the lord of the honour, to come to the leet of the honour, he who is so distrained may have a general writ of trespass, or a special writ upon his case: so if any officer takes toll of him who ought to be quit of toll, he shall have a general writ of trespass, or an action upon his case, as appears by Fitz. ib. 94. And if a Prior or other prelate, is riding in his journey, and one distrains his horse upon which

he

* Doct. pl. 67.

(a) 3 Co. 22. a.
 5 Co. 81. b.
 8 Co. 153. a.
 10 Co. 128. b.
 2 Brownl. 62, 63.
 Co. Lit. 47. b.
 292. b.
 F. N. B. 130.
 131. a. 131. b.
 Yelv. 67. 1 Leon.
 300, 319. 2 Leo.
 107, 108, 131.
 Mo. 13. 3 Leon.
 4. 4 Leon. 13.
 Owen 40. Benl.
 in Ash. pl. 10.
 O. Benl. 3. pl. 8.
 N. Benl. 57. pl.
 93. Benl. in
 Kelw. 208, 209.
 Cro. El. 118,
 119, 776, 807.
 Cro. Jac. 505.
 Cro. Car. 421.
 1 Roll. 22, 601.
 1 Roll. Rep. 221.
 2 Roll. Rep. 47.
 Br. *Action sur*
le Case 108. in
 fine. 2 Sand. 337.
 Latch. 216.

he is riding when he may distrain other goods, he may have a general action of trespass, or an action upon his case, as appears in the Register, 100. b. & F. N. B. 93. H. If the Sheriff suffers one in execution upon a statute merchant to escape, the conusee may have an action of debt, (a) or an action on the case, as appears by the Register, 98. b. & F. N. B. 93. B. C. So if a man ousts the executors of his lessee for years of their term, they may have a special writ upon their case, as appears F. N. B. 92. G. & Register 97. and yet they may have *Ejectione firmæ*, or trespass. And therefore it was concluded, that in all cases when the Register has two writs for one and the same case, it is in the party's election to take either. But the Register has (b) two several actions, *sc.* action upon the case upon *assumpsit*, and also an action of debt, and therefore the party may elect either. And as to the objection which has been made, that it would be mischievous to the def. that he should not (c) wage his law, forasmuch as he might pay it in secret: to that it was answered, that it should be accounted his folly that he did not take sufficient witnesses with him to prove the payment he made; but the mischief would be rather on the other party, for now experience proves that mens consciences grow so large that the respect of their private advantage rather induces men (and chiefly those who have declining estates) to perjury; for *Jurare in propria causa* (as one saith) *est sæpenumero hoc seculo præcipitium diaboli ad detrudendas miserorum animas ad infernum*: and therefore in debt, or other action where wager of law is admitted by the law, the Judges without good admonition and due examination of the party do not admit him to it. And as to the case which was cited, that debts or duties due by single contract where the party may wage his law, shall not be (d) forfeited by outlawry, because the debtor will be thereby ousted of his law: to that it was answered by the Attorney General that in such case by the law, debts or duties shall be forfeited to the King, and so are the better opinions of the books, *sc.* 3 E. 3. Corone 343. 19 E. 2. Avowry 223. If the tenant of a Prior alien is amerced for default of suit to the court-baron, the King seises the possessions of the Prior alien, he shall have this debt due for the amercement; yet in an action of debt brought for it by the prior alien, he shall have his (e) law, as it was adjudged 6 E. 6. in Serjeant Bendloe's Reports, 28 E. 3. 92. in Accompt, & Stamf. Pleas of the Crown 188. and infinite precedents in all ages in the Exchequer, which I have seen, approve it, and so it was now lately resolved in the Exchequer, and so it was held in this case by Popham, Anderson, and divers other Justices with whom I have conferred against the sudden opinions in 49 E. 3. 5. 50 Ass. 1. 16 E. 4. 4. & 9 Eliz. 262. (f) and so you have a doubt

(a) Cr. Car. 540.

(b) Dyer 21. pl. 125.

(c) Co. Lit. 295. a. 9 Co. 88. b.

(d) 2 Vent. 282.
Moor 204, 206.
Antea 93. a. contra. 2 Roll. 806.
Cr. El. 575,
851, 203.
Cro. Car. 187.
Stamf. Cor.
188. a. Dy. 262.
pl. 31. Hard.
226. Wentworth 23.
Noy 155, 176.
1 Leon. 64.
(e) O. Benl. 41.
Moor 276, 277.
1 Leon. 203, 204.

(f) Dyer 262.
pl. 31.

(a) 9 Co. 88. a.
Co. Lit. 295. a.
Br. Ley 102.
Godb. 291.
32 H. 6. 24. a.

3. Blackst. Com.
ch. 22. fol. 342,
343, 344, 345.
&c.

a doubt in our books well resolved. *Et nota* reader, in every (a) *Quo minus* in the Exchequer brought by the King's debtor against one who is indebted to him on a simple contract, the defendant shall not have his law, for the benefit of the King, as appears in 8 H. 5. Ley 66. 20 E. 3. Ley 42. 10 H. 7. 6. and yet there the King is not party, *a fortiori* when such debt or duty is forfeited to the King, and the King is the sole and immediate party: *et nota* reader, this resolution as to this point, agrees with the judicial law of God, upon which our law is in this point grounded, for it appears by the 22d chapter of Exodus, ver. 7. *Si quis commendaverit amico pecuniam, &c. & ver. 10. Si quis commendaverit proximo suo asinum, bovem, ovem, & omne jumentum ad custodiam, & mortuum fuerit, aut debilitatum aut captum ab hostibus, nullusque hoc viderit, jusjurandum erit in medio quod non extenderit manum ad rem proximi sui, suscipietque Dominus juramentum & ille reddere non cogetur*; by which it appears that it is in the election of the plaintiff, either to charge the defendant by witnesses if he will, and to oust him of his law, or to refer it to the defendant's oath; for the text saith, *nullusque hoc viderit, sc.* if there be no witnesses, so by our law in the same case put in the text, the owner has election either to bring an action on the case in which the defendant cannot wage his law, or an action of *Detinue* in which he may, *et jusjurandum in hoc casu est finis*; for the plaintiff is bound thereby, and it is the end of the controversy. And I am surpris'd that in these days so little consideration is made of an oath, as I daily observe; *Cum jurare per Deum actus religionis sit, quo Deus testis adhibetur tanquam is qui sit omnium rerum maximus, &c.* *Nota* reader, for witnesses or acquittance (on oath.)

ADAMS and LAMBERT's Case,

Hil. 40 Eliz. Rot. 788.

In the King's Bench:

Bucks, ff. **B**E it remembered that heretofore, that is to say, Ejectment.
 in the term of St. Michael last past, before the
 lady the Q. at Westminster, came Theophilus Adams, Gent.
 by John Povey his attorney, and brought here in the court of
 the said lady the Q. then there, his certain bill against John
 Lambert in the custody of the Marshal, &c. of a plea of trespass
 and ejectment of farm, and there are pledges of prosecuting (to
 wit) John Doe, and Rich. Roe, which said bill followeth in
 these words, ff. Bucks, ff. Theo. Adams, Gent. complaineth
 of John Lambert being in the custody of the Marshal of the
 Marshalsea of the lady the Queen, before the Queen herself,
 for that, that is to say, that whereas one Rob. Snelling, Gent.
 and Tho. Butler, Gent. on the 23d day of May, in the 36th
 year of the reign of the lady Eliz. the now Queen of England,
 at the town of Buckingham in the county aforesaid, had de-
 mised, and to farm letten to the said Theo. 1 messuage and 10
 acres of pasture, with the appurtenances, to the said messuage
 near lying, called the Conigree, situate, lying, and being in
 the town of Buckingham aforesaid, in the county aforesaid, to
 have to the said Theo. and his assigns, from the aforesaid 23d
 day of May, in the 36th year aforesaid, until the end and
 term of ten years from thence next following, and fully to
 be complete and ended, by virtue of which said demise the same
 Theo. afterwards, that is to say, on the 16th day of April, in
 the 39th year of the reign of the said lady the now Queen,
 entered into the aforesaid tenements with the appurtenances,
 and was thereof possessed until the aforesaid J. Lambert after-
 ward, that is to say, on the same 16th day of April, in the 39th
 year aforesaid, with force and arms, &c. entered into the
 tenements aforesaid with the appurtenances upon the possession
 of the said Theo. thereof, and him the said Theo. from his
 farm thereof, his term afores. not yet ended, ejected, expelled,
 and amoved, and from his possession thereof held out, and yet
 holdeth out, and other wrongs to him did against the peace of
 the said lady the now Q. to the damage of the said Theo. of
 20l. and thereof he bringeth suit, &c. and now at this day, that
 is to say, Monday next after eight days of St. Mich. in this
 term until which day the aforesaid J. Lambert had licence to
 imparl to the bill afores. and then to answer, &c. before the lady
 the Q. at Westm. come as well the aforesaid Theo. Adams, by
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ADAMS and LAMBERT's Case. Part IV.

his attorney aforesaid, as the said J. Lambert, by J. H. arborn his attorney, and the said J. Lambert defendeth the force and injury when, &c. and saith, that he is not thereof guilty, and of this he putteth himself upon the country, and the said Theo. likewise, &c. therefore let a jury thereof come before the lady the Q. at Westm. on Monday next after the morrow of the Purification of the Blessed Mary, by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. the same day is given to the parties aforesaid there, &c. from which day the jurors afores. between the parties aforesaid, of the plea afores. were put in respite before the lady the Q. at Westm. until Monday next after a month of Easter, in the 41st year of the said lady the now Q. for default of jurors, &c. at which day before the said lady the Q. at Westminster aforesaid come the parties aforesaid by their attornies aforesaid; and the jurors of the same jury being called come likewise, who to say the truth of the premises being chosen, tried, and sworn, say upon their oath, that long before the said time of the trespass and ejectment afores. that is to say on the 5th day of the month of June in the year of our Lord 1431, and in the 9th year of the reign of King Hen. 6. after the Conquest, one J. Barton the elder was seised of the afores. messuage, and of six acres of pasture, parcel of the afores. 10 acres of pasture in the declar. afores. specified, in which it is supposed the tresp. and ejectm. afores. to be done, amongst other things, in his demesne as of fee, and being so seised of the messuage afores. and of the said six acres of past. with the appurt. parcel, &c. enfeoffed W. Brampton, to have and to hold to him and his heirs to the behoof and use of the afores. J. Barton the elder, and his heirs: by virtue whereof, the afores. W. Brampton was seised of the messuage and six acres of land, parcel, &c. with the appurt. in his demesne as of fee, to the use of the aforesaid J. Barton and his heirs, and the afores. W. Brampton, being so seised thereof, the afores. J. Barton afterwards, that is to say, on the afores. 5th day of the month of June, in the year of our Lord 1431, in the said 9th year of the reign of the said late King Hen. 6. afores. at Buck. afores. made his testament and last will within written of the afores. messuage and six acres of pasture, parcel, &c. amongst other things in these words, &c. “ *In the name of God, Amen.* ff. The 5th day of the
“ month of June 1431, of the late reign of K. Hen. 6. after
“ the conquest of England the 9th, I John Barton the elder,
“ being of perfect mind and good memory, do make and
“ ordain my present testament indented containing my last
“ will, in this manner: *Imprimis*, I give and recommend
“ my soul to God and my omnipotent Creator and Saviour,
“ and to the blessed Mary the Virgin his mother, and to all
“ the saints, and my body to be buried in the church of the
“ blessed Peter the apostle of Buckingham, that is to say,
“ in the church of St. Romwold, in the same place, wherein
“ a marble stone for my burying I have ordained and appointed, and for this my burial there to be had I give to
“ the building of the body of the said church, 40 s. also I
“ will

" will, and ordain, that speedily after my death there be celebrated
 " for my soul, 4000 masses, for the celebrating of which I give
 " 16 l. 13 s. and 4 d. and for his pains who about this shall em-
 " ploy himself, that fully, faithfully, and speedily it be per-
 " formed, 6 s. 8 d. *Item*, I give to the religious men under-
 " written, that they as soon as by my executors or their deputies
 " they be acquainted of my death, so speedily as conveniently it
 " may be done, every order of them say a *Placebo* and *Dirige* by
 " note, and the day following the mass of *Requiem* with note for
 " my soul, the souls of my father and mother, my friends and be-
 " nefactors, and for the souls of all the faithful departed, that is
 " to say, to the Master and Brethren of the house and church of
 " St. Thomas the Martyr of Canterbury, called of Acon, London,
 " 40 s. to the Master and Brethren of the hospital of St. Bartholo-
 " mew in West Smithfield London, 40 s. to the Abbot and Con-
 " vent of Betlesden in the county of Buckingham 100 s. to the
 " Prior and Convent of Luffield, 40 s. to the Prior and Convent
 " of Cheitwood 40 s. to the Prior and Convent of Snellsale, 20 s.
 " to every order of the four orders of Friars Mendicants in the town
 " of Northampton 20 s. to every order of the four orders of Friars
 " Mendicants of the town of Oxford 20 s. to the Convent and Fri-
 " ars Minors of Aylsbury 20 s. to every order of the five orders
 " of Friars in the city of London 20 s. Also I bequeath to the
 " brother John Upton, 100 s. that he for my soul celebrate for
 " one whole year next after my death; and I will that all the re-
 " ligious men aforef. by my executors or their deputies be charged
 " that they especially pray for my soul. *Item*, I give and be-
 " queath to John Barton the younger, my brother, all my tenem.
 " together with all the tenem. which late were Roger Skiret's,
 " which I purchased, with the rents and services, together with
 " the reversion and all their appurt. in the town of Buckingham,
 " in the county of Buckingham, to have and to hold all the te-
 " nem. aforef. with their appurt. to the aforef. John my brother,
 " for the term of his life, upon the conditions following, that is
 " to say, that the said John my brother, during his life, find one
 " fit and honest chaplain, to celebrate for my soul and the souls
 " of my father, mother, brothers, sisters, benefactors, and my
 " friends, and of all the faithful deceased, at the altar of Saint
 " James in the aforefaid church of the blessed Peter, daily; and
 " I will and ordain, that the aforefaid chaplain in all festival
 " days be present at mattins and vespers, in the choir of the
 " church aforefaid: and I will that the said chaplain, every day
 " within the church aforefaid, the mattins of St. Mary, and after
 " the mattins of the day with the other hours canonical, and these
 " to be ended every day, the said chaplain before he goeth to
 " mass, read a part of the Psalter of David, so always that by the
 " said chaplain every week be said one Psalter of David, and
 " afterwards daily when he is not troubled with sickness, that he
 " go to mass, which mass ended, before he go from the altar, he
 " read the psalm *De profundis*, with the prayer *Inclina*, and daily
 " after dinner, as it shall seem best to him that the said chaplain
 " say in the said church of the blessed Peter, a *Placebo* and *Dirige*
 " with nine readings, the time of Easter excepted, in which
 " time of Easter let him say *Officium moriuorum* with three read-
 " ings, according to the use of Salisbury, and every following
 " day of the same time of Easter, the Psalter of the blessed Mary
 " the Virgin, and afterwards the commendations of souls,
 " with the prayer, *Tibi Domine commendamus*, but afterwards that
 " he say the vespers for the day, and afterwards the vespers of

" St. Mary, and that the said chaplain, if not hindered with sick-
 " nefs, every day that he shall make default of saying mafs in the
 " said church of St. Peter, that he give to one of the poor of the
 " town of Buckingham aforefaid, one penny. I will alfo, that
 " the said chaplain make his abode always there, yet that the said
 " chaplain every year have recreation by the fpace of 15 days,
 " fo always as the said chaplain fupply his turns by another
 " chaplain, for every day of the faid 15 days, to give to one of the
 " poor of the town of Buckingham, a penny : and I will that the
 " aforefaid John my brother yearly during his life, pay to the
 " said chaplain in the aforefaid church of St. Peter, for his main-
 " tenance and his pains, as before is faid done and to be done,
 " 10 marks of lawful money of England out of the iffues and
 " profits of the tenements aforefaid ; fo always, that the faid
 " chaplain of the faid fum of 10 marks for his falary or ftipend,
 " reputed himfelf contented, from no other any ftipend to be re-
 " ceived or taken : and I the faid John Barton the elder, the faid
 " teftator, will and ordain, that the faid chaplain and his fuccef-
 " fors to the office and fervice aforefaid, be chofen, ordained,
 " preferred, admitted, and received, by the Mafter and Brethren
 " of the houfe or church of St. Thomas the Martyr of Canterbury,
 " called of Acon, London, aforefaid, and his fucceffors for ever ;
 " and if they do not behave themfelves well and honeftly, or if
 " they fhall neglect or refufe to do or perform the charges afore-
 " faid, by the faid Mafters and Brethren and their fucceffors, or
 " by their fufficient deputies, from the faid office or fervice they
 " be removed and expelled, and another fit chaplain in the place
 " of the faid chaplain for his faults removed, expelled, or by
 " death failing, or otherwife howfoever from the faid office or
 " fervice ceafing or departing, by the aforefaid Mafters and
 " Brethren of the houfe and church of St. Thomas aforefaid, and
 " his fucceffors be chofen, ordained, preferred, admitted, and
 " received, fo as the Lord Bifhop of Lincoln, who for the time
 " fhall be, or the Archdeacon of the place, or the Prebendary of
 " the Prebend of Buckingham, or other in their name, upon
 " the election, ordination, preferring, admiſſion, and remotion
 " or removing of the faid chaplain, no jurisdiction or power have
 " or claim hereafter in any manner ; therefore let the faid mafter
 " and brethren and their fucceffors take care upon the peril
 " of their fouls, as they will answer the fame before the moſt high
 " Judge, that neither for favour, love, prayer, or price, they
 " ordain any chaplain into the aforefaid office or fervice, or admit
 " or receive but an honeſt and an approved perfon as much as his
 " converſation can appear to them, and that the aforefaid chap-
 " lain to the faid office and fervice to be admitted, on his firſt
 " admiſſion, the aforefaid Maſter and Brethren of the houfe and
 " church of St. Thomas aforefaid and their fucceffors, take his
 " corporal oath upon the Holy Gofpel, all and fingular the
 " charges aforefaid without fraud or deceit, or any difpenſation
 " upon them to the contrary notwithstanding, in the manner and
 " form aforefaid above declared, well and faithfully to be done and
 " performed, as much as human frailty will admit : and that every
 " chaplain to the faid office or fervice to be admitted, on his firſt
 " admiſſion find and make to the Mafters and Brethren of the houfe
 " and church of St. Thomas the Martyr, of Canterbury, called of
 " Acon, Lond. aforef. for the time being, fufficient ſecurity for the or-
 " naments of the faid altar of St. James belonging fafely and ſecurely
 " to keep, and in their reſigning and ceafing, to render back and deli-
 " ver : and moreover that the faid John my brother, during his life,

“ find in the town aforefaid, fix poor men or women, to pray for
“ my foul and the fouls aforef. every day for ever, and that he
“ give every week during his life to every one of the fame poor,
“ four pence, and alfo to every one of them their dwelling, as (by
“ the will of God) for them I have appointed and ordained, and
“ alfo that the faid John my brother, all his life, find one lamp
“ burning every day and night before St. Romwald in the church
“ of the blessed Peter aforef. as now is found and maintained; and
“ that my faid brother, during his life, hold or caufe to be held my
“ anniverfary, and of my father and mother, yearly, on the day
“ of the tranflation of St. Benediſt, in the church of the blessed
“ Peter aforefaid, in which anniverfary the faid John my brother
“ yearly find two wax lights at the *Dirige*, and the day following
“ at the maſs, one at the head, and the other at the feet of my
“ ſepulchre burning, every wax light to contain three pounds; which
“ funerals of me being completed, I will that all that which ſhall
“ be remaining of the faid wax lights, be ſent and remain to the
“ altar of St. James aforefaid, upon the candleſtick there being,
“ to the chaplain of my chantry aforefaid, to ſerve every feſtival
“ day at maſs, as long as it may laſt: and that the aforefaid
“ John my brother during his life find yearly one competent torch
“ to ſerve at the altar aforefaid: and I will that all the aforefaid
“ tenements, rents, and ſervices, with the reverſions, and all their
“ appurtenances, after the deceaſe of the faid John my brother,
“ wholly remain to Margaret and Iſabel my ſiſters, for the term of
“ their lives, and the life of the longer liver of them, to be holden
“ of the chief lords of the fee, by the ſervices thereof due and of
“ right accuſtomed; upon condition that the faid Margaret and Iſa-
“ bel, during their lives, do perform and obſerve all and ſingular
“ the charges before limited in form aforef. and after the death of
“ the faid Margaret and Iſabel, I will all the aforef. tenements,
“ rents, and ſervices, with the reverſions, and all their appurte-
“ nances wholly to remain to William Fowler, to be holden to
“ him and the heirs of his body lawfully to be begotten, of the
“ chief lords of the fee, by the ſervices thereof due and of right ac-
“ cuſtomed, upon condition, that he the faid William and his heirs
“ do perform and keep all and ſingular the charges above written
“ in the form aforef. for ever. And if it ſhall happen that the faid
“ Wm Fowler ſhall die without heir of his body lawfully begotten,
“ that from thence all the aforef. tenements, rents and ſervices with
“ the reverſions, and all their appurt. whole remain to John So-
“ merton my couſin, and the heirs of his body lawfully begotten,
“ to be holden of the chief lords of the fee, by the ſervices thereof
“ due and of right accuſtomed, upon condition that he the faid
“ John Somerton, and his heirs, all and ſingular the charges above
“ written in form aforef. fulfil and keep for ever; and if it ſhall
“ happen that the faid John Somerton ſhall die without heir of his
“ body iſſuing, that from thence all the aforef. tenements, rents,
“ and ſervices with the reverſions and all their appurtenances,
“ wholly remain to William Purfrey my couſin, and the heirs of
“ his body lawfully begotten, to be holden of the chief lords of the
“ fee, by the ſervices thereof due and of right accuſtomed, upon
“ condition, that the ſame Will. Purfrey and his heirs aforef. do
“ perform and obſerve all and ſingular the charges above written
“ in form aforefaid for ever: and if it ſhall happen that the faid
“ Will. Purfrey ſhall die without heir of his body iſſuing, from
“ hence I do give and bequeath that all the aforef. rents and ſer-
“ vices with the reverſions, and all their appurtenances, wholly
“ remain to the Maſter of the Houſe of St. Thomas the Martyr of

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" Acon, London afores. to have and to hold to him and his suc-
 " cessors, Masters of the same house of St Thomas, to the end and
 " term of 40 years from thence next following, and fully to be
 " completed : and after the said term be ended, that all the tene-
 " ments afores. rents and services, with the reversions, and all their
 " appurt. remain to the Master of the Hospital of St. Bartholomew
 " in West-Smithfield, London. afores. to have and to hold to the
 " same Master and his successors, Masters of the said Hospital of
 " St. Bartholomew, to the term and end of 40 years from thence
 " next ensuing and fully to be completed ; to every of them
 " upon the condition following, that is to say, that every of the
 " said Masters and their successors, during their term, do and per-
 " form all and singular the charges above limited in form afores.
 " and if it shall happen the said John my brother during his life
 " in fulfilling the charges afores. to make default, or not to per-
 " form the same, or all the aforesaid tenements during his life
 " not sufficiently to repair and sustain, or the same or any parcel
 " thereof to alien or to let the same at a lower rate in prejudice
 " to the other persons in remainder aforesaid named, that then
 " it shall be lawful to the said Margaret and Isabel into the a-
 " fores. tenements, rents and services, with the reversions, and all
 " their appurtenances to enter, and the same to hold as in their re-
 " mainder afores. without the contradiction of any one, and that
 " from thence the estate of the said John my brother shall altogether
 " cease, and be of no value : and if it shall happen the said Mar-
 " garet and Isabel during their lives in doing and performing of
 " all the charges afores. to make default, or the same not to fulfil,
 " or all the tenem. afores. during their lives not sufficiently to sus-
 " tain and repair, or them to alien or demise as before is said, or
 " be negligent to enter, if cause as aforesaid shall happen, that
 " then it shall be lawful to the aforesaid Will. Fowler, and his
 " heirs aforesaid, into all the aforesaid tenements, rents, and ser-
 " vices, with the reversions, and all their appurtenances, to enter
 " as in his remainder afores. and the same to hold without any
 " contradiction, and that then the estate of the said Margaret
 " and Isabel as aforesaid, altogether to cease and be of no value :
 " and if the aforesaid William Fowler, or his heirs aforesaid, in
 " doing and performing make default, or not to fulfil, or all the
 " aforesaid tenements not sufficiently to be sustained or repaired, or
 " to be aliened or demised as before is said, or be negligent to en-
 " ter, if cause as before is said shall happen, that from thence it be
 " well lawful to the aforesaid John Somerton, and his heirs a-
 " bovesaid into all and singular the afores. tenem. rents and ser-
 " vices, with the reversions and all their appurt. to enter as in his
 " remainder aforesaid, and the same to hold without any con-
 " tradiction, and that from thence the estate of the said William
 " Fowler and his heirs aforesaid, as is aforesaid, shall cease and
 " be of no value : and if it happen the aforesaid John Somerton,
 " or his heirs aforesaid in doing and performing all and singular
 " the charges aforesaid to make default, or the same not to fulfil,
 " or all the aforesaid tenements not sufficiently to uphold and re-
 " pair, or to alien or demise the same as above is said, or that they
 " be negligent to enter if cause as before is said shall happen, that
 " from thence it shall be well lawful to the afores. Will. Purfrey
 " and his heirs afores. into all the tenements aforesaid, rents, and
 " services, with the reversions, and all their appurtenances to
 " enter as in his remainder aforesaid, and the same to hold
 " without any contradiction, and that from thence the estate of
 " the said John Somerton and his heirs aforesaid, in all the

“ tenements afores. altogether to cease, and be of no value. And
“ if it happen the said Will. Purfrey, and his heirs aforesaid, in
“ fulfilling all and singular the charges aforesaid to make default,
“ or the same not to repair, or all the aforesaid tenements not
“ sufficiently to uphold and repair, or the same to alien or demise,
“ as above is said, or they be negligent to enter, if cause as before
“ is said shall happen, that then the estate of the said Will. Pur-
“ frey, and his heirs, altogether to cease, and be of no value; and
“ that from thence it be lawful to the said Master of the house
“ of the Holy Martyr of Acon, London, and his Brethren, of the
“ same house, and their successors, into all the aforesaid tene-
“ ments, rents and services, with the reversions, and all their ap-
“ purtenances to enter, as in the remainder of their term afores-
“ said, to be holden in form aforesaid; and if it shall happen the
“ said Master and Brethren of the house of St. Thomas aforesaid,
“ or their successors aforesaid, in doing and fulfilling all and
“ singular the charges above specified to make default, or the
“ same not to fulfil, or all the tenements afores. as above is said,
“ not sufficiently to uphold and repair, or they be negligent to
“ enter, if cause shall happen as before is said, that from thence
“ it shall be lawful to the Master of the Hospital of St. Bartholo-
“ mew aforesaid, and the Brethren of the said Hospital, and their
“ successors, into all the aforesaid tenements, rents and services,
“ with the reversions and all their appurt. to enter as in the re-
“ mainder of their term afores. and that then the estate of the said
“ Master of the house of St. Thomas aforesaid to cease: and if it
“ happen the said Master and Brethren of the Hospital of St. Bar-
“ tholomew aforesaid, in doing and fulfilling all and singular the
“ charges above declared to make default, or the same not to per-
“ form, or all the tenements aforesaid, not sufficiently to uphold
“ or repair, that then it shall be lawful to my right heirs, into
“ all the aforesaid tenements, rents and services, with the rever-
“ sions, and all and singular the appurtenances to enter, and the
“ same to hold, without any contradiction whatsoever for ever, sup-
“ porting all the charges aforesaid, as above is said, as they will
“ for me and them before the most high Judge answer. And be-
“ cause this my last will was made and ordained for the good of
“ the souls of my father and mother, and of my own soul, and the
“ souls of my brothers and sisters, friends and benefactors, I pray
“ and charge the said John my brother, as for me and himself he
“ will answer it, that all his life-time he oversee the government
“ of the chantry afores. and that the charges afores. in this my
“ last will and testament, declared, be inviolably fulfilled and kept;
“ and that he give notice to all those who in manner afores. shall
“ have any estate in the said tenem. rents and services, with the
“ reversions and all their appurtenances, that they know the te-
“ nor of this my last will and testament. And I will that my
“ feoffees of the tenements with the appurtenances, which my
“ poor men now dwell in, because the same is not devisable, that
“ they make such estate after my death, to all those abovenamed,
“ as they have of my bequest of and in the tenem. in Bucking-
“ ham afores. to the use of the said poor their dwelling, uphold-
“ ing the reparations of the said tenements of the afores. poor, as
“ often as need shall require: and because I doubt lest the tenem.
“ afores. be sufficient to uphold all the abovesaid charges, by rea-
“ son of the great charge of repairing thereof, I will that my feof-
“ fees presently after my death make such estate to all those above-
“ named, of all those my lands and tenements in the towns
“ of Barton, Moreton, Gavescote, with the Prebend of Lemburg,

ADAMS and LAMBERT's Case. Part IV.

“ Thornborough, Hillesden, Waterstratford, Shaldeston, and
 “ Foycote, in the county of Buckingham, and of all those
 “ lands with the appurtenances in the fields of Buckingham,
 “ as also of my lands and tenements in Worton, in the coun-
 “ ty of Oxford, and of my one tenement in the town of Ox-
 “ ford, in which the feoffees shall have as they have of my gift
 “ of and in the tenements of Buckingham aforesaid, so as they
 “ may sufficiently uphold all the charges afores. and receive
 “ and take, what is reasonable for their labour and pains.
 “ *Item*, I will that my executors, or one of them, according to
 “ their assignment, upon the Good-Friday next after my death,
 “ cause him who shall preach at the cross in the church-yard
 “ of the cathedral church of St. Paul, London, to the prayers
 “ there of the people, recommend my soul to the congregation
 “ there assembled; for which recommendation (and that he
 “ pray for my soul) I will that the preacher have 40 pence.
 “ *Item*, I will that the three preachers, who in the church-
 “ yard of the new hospital of the Blessed Lady without Bishopsgate,
 “ London, in the three days in the week of Easter, next
 “ after my death, shall preach, recommend my soul to the
 “ prayers of the faithful people there assembled, and that every
 “ one of the said three preachers, for the same recommendation
 “ of my soul, and that they pray for my soul, have 40
 “ pence. And I will, that my executors during one whole
 “ year next after my decease, every Lord's day, cause the
 “ preacher at the cross in the church-yard of the cathedral
 “ church of St. Paul afores. preaching, specially recommend
 “ my soul to the prayers of the people there assembled, for
 “ which recommendation, every of the said preachers have
 “ four pence. *Item*, I give to Mr. Robert Forset, my Chap-
 “ lain, of London, ten pounds, that the said Robert specially
 “ celebrate for my soul, and pray for it for eight years next
 “ following my decease, taking yearly for his salary 100 shil-
 “ lings, if he so long live. And if he shall die within the said
 “ term of eight years, that then the said Rob. make the residue
 “ which thereof shall remain, to be distributed unto pious uses
 “ for my soul, and the soul of the said Robert. *Item*, I give to
 “ Margaret my sister, 100 shillings, and a silver cup, with a
 “ cover belonging to it. *Item*, I give to Isabel my sister, 100
 “ shillings, and a silver cup, with a cover belonging to it,
 “ that the said Margaret and Isabel pray for my soul: and to
 “ this testament, containing my last will, well and truly, and
 “ faithfully to be performed, and inviolably to be fulfilled, I
 “ ordain and appoint my executors, John Barton my brother,
 “ and Alexander Sprot, citizen and clothworker of London;
 “ and the said Robert Forset my Chaplain, overseer of this
 “ my present testament; I ordain and appoint John Wa-
 “ kering, Master of the Hospital of Saint Bartholomew afore-
 “ said: to which my executors, and overseers above-
 “ named, I give the rest of all and singular my goods and
 “ chattels, which shall remain by me not distributed, disposed
 “ nor bequeathed, in this last will, faithfully and speedily to be
 “ distributed

“ distributed for my soul, willing, that the said executors, and
“ overseer, according to their discretions and consciences,
“ take of my goods what is reasonable for their pains : and
“ that my present testament and last will before written, be
“ as speedily as conveniently it may be, by my executors per-
“ formed and executed, as in the fearful day of the last judg-
“ ment for me and them before the most high Judge, who is
“ ignorant of nothing, they will answer. In witness where-
“ of, to this my present testament indented, containing my
“ last will, I have set my seal : dated the day and year afore-
“ said.” And the jurors aforesaid, further say, upon their
oath afores. that the afores. William Brampton, being so seised
of the said messuage, and six acres of pasture, parcel, &c. a-
mongst other things, &c. as is before said, the said John Bar-
ton the elder, afterwards at Buckingham afores. died : after
the death of the said John Barton the elder, the afores. William
Brampton was seised of the messuage aforesaid, and six acres
of lands aforesaid, parcel, &c. in his demesne as of fee, to the
several uses and intents in the aforesaid last will of the afores.
John Barton the testator above expressed : and that the said John
Barton the younger, after the death of the said John Barton
the testator, into the aforesaid messuage, and six acres of pasture
with the appurtenances, parcel, &c. entered, and the rents and
profits thereof yearly, after the death of the said John Barton
the testator, arising, for and during the life of him the said
John the younger, took and had, and the same to the uses, in-
tents, and appointments, in the said testament and last will
thereof limited and appointed, during the life of the said John
the younger, did convert, apply, and pay : and afterwards, and
before the said time when, &c. the said John Barton the
younger, at Bucking. aforesaid died : after the death of the
said John Barton the younger, the aforesaid Will. Brampton
was seised of the aforesaid messuage, and six acres of pasture
aforesaid, parcel, &c. with the appurtenances, in his de-
mesne as of fee, unto the uses and intents in the aforesaid
last will of the said John Barton the testator, before expressed
to be performed : and that the said Margaret and Isabel, after
the death of the said John Barton the younger, into the afore-
said messuage and six acres of pasture, parcel, &c. with the
appurtenances, entered, and the rents and profits thereof
yearly, after the death of the said John Barton the younger,
arising for and during the lives of the said Margaret and
Isabel, and the longer liver of them, took and had, and the
same to the uses, intents, and appointments, in the said tes-
tament and last will of the aforesaid John Barton the testa-
tor, declared, limited, and appointed, during the lives of
the said Margaret and Isabel, applied, converted, and payed,
and the longest liver of them did apply, convert, and pay ;
and afterwards and before the said time when, &c. the afore-
said

said Margaret and Isabel, at Buckingham aforesaid died. After the deaths of which Margaret and Isabel, the said Will. Brampton was seised in his demesne as of fee, of and in the aforesaid messuage, and six acres of pasture aforesaid, parcel, &c. with the appurtenances, to the uses and intents in the aforesaid last will, of the aforesaid John Barton the elder the testator, expressed to be fulfilled: and that the said Will. Fowler in the testament aforesaid named, had issue of his body lawfully begotten, one Rich. Fowler, and the said Will. Fowler after the deaths of the said Margaret and Isabel, into the aforesaid messuage, and six acres of pasture, parcel, &c. with the appurtenances, entered, and the rents and profits thereof yearly, after the deaths of the said Margaret and Isabel, arising, for and during the life of the said W. Fowler, took and had, and the same to the uses, intents, and appointments in the said testament and last will of the aforesaid John Barton the elder the testator expressed, during the life of the said W. Fowler, applied, converted, and payed; and afterwards, on the 6th day of July, in the 30th year of the reign of King Hen. VI. the said W. Fowler, at Buckingham aforesaid died, after the death of the said W. Fowler, the aforesaid Will. Brampton was seised of and in the said messuage and six acres of pasture aforesaid, parcel, &c. with the appurtenances, in his demesne as of fee, to the uses and intents in the aforesaid last will of the aforesaid John Barton the elder before expressed to be fulfilled: and that the said Rich. Fowler had issue of his body lawfully begotten, one Edward Fowler, and the said Richard Fowler, after the death of the said W. Fowler, into the aforesaid messuage, and six acres of pasture, parcel, &c. with the appurtenances entered, and the rents and profits thereof yearly after the death of the said W. Fowler, arising, for and during the life of the said Rich. Fowler took and had, and the same to the uses, intents, and appointments, in the said testament and last will of the said John Barton the elder the testator, during the life of the said Rich. Fowler, applied, converted, and payed, that is to say, until the 3d day of Nov. in the 7th year of the reign of K. Edw. IV. after the Conquest of England, on which said 3d day of November, the aforesaid Rich. Fowler, at Buckingham aforesaid died: after the death of which Richard aforesaid, the aforesaid W. Brampton was seised of the messuage, and six acres of pasture aforesaid, parcel, &c. with the appurtenances in his demesne as of fee, to the uses and intents in the testament aforesaid of the said John Barton the testator, limited, and declared, to be fulfilled; and that the said Edw. Fowler, had issue of his body lawfully begotten, one Gabriel Fowler, and the said Ed. after the death of the said Rich. Fowler, into the aforesaid messuage and six acres of lands, parcel, &c. with the appurtenances entered, and the rents and profits thereof yearly, after the death of the said Rich. Fowler, arising, for and during

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ing the life of the said Edward took and had, and the same to the uses, intents, and appointments, in the said testament and last *will* declared and limited, until the 4th day of Feb. in the 27th year of the reign of K. Hen. 8. applied, converted, and paid, on which said 4th day of Feb. by virtue of a certain act of parliament held at Westminster in the county of Middlesex, made for transferring of uses into possession, the afores. Edw. Fowler, was seised of and in the afores. messuage, and six acres of pasture, parcel, &c. with the appurtenances, in his demesne as of fee-tail, and being so seised thereof, the issues and profits thereof all his life took and had, and the same to the uses and intents in the testament of the said John Barton the elder above expressed, applied and converted; and that the aforesaid Edward, being so seised thereof afterwards, that is to say, on the 28th day of May, in the 32d year of the reign of the late King Hen. 8. at Buckingham aforesaid, of such his estate died thereof seised, after the death of which said Edw. Fowler, the said messuage and six acres of pasture, parcel, &c. descended to the said Gabriel Fowler, as son and heir of the body of the said Edw. Fowler lawfully begotten, by virtue of which the aforesaid Gabriel, into the aforesaid messuage, and six acres of pasture, parcel, &c. with the appurtenances, entered, and was thereof seised in his demesne as of fee-tail, that is to say, to him, and the heirs of his body lawfully begotten, the reversion in fee-simple thereof to the right heirs of the said John Barton the testator expectant, unto the uses in the said last will of the said John Barton the testator expressed to be performed; and the afores. Gabriel Fowler, the issues and profits thereof to the uses and intents in the said testament of the afores. J. Barton the testator to be performed, limited, received, disposed, and converted, from the time of the death of the said Edw. Fowler, within five years next before the first year of the reign of King Edw. 6. that is to say, until the 4th day of May, in the 37th year of the reign of the late K. Hen. 8. by virtue of which aforesaid premises, and by force of a certain act of parliament, of the said King Edward late King of England the 6th at Westminster, in the county of Middlesex, begun the 4th day of November, in the first year of his reign, and from thence continued until the 24th day of the same November then next following, and then and there holden, concerning colleges, free chapels, chauntries, fraternities, guilds, and other spiritual promotions, made and provided, the aforesaid late King Edw. 6. immediately after the feast of Easter next following, after the making of the said act of parliament, was seised of and in the aforesaid messuage, and the aforesaid six acres of pasture, parcel, &c. with the appurtenances (amongst other things) in the said testament as is aforesaid given and appointed, in his demesne

demefne as of fee, in the right of his crown of England, if the law of England so in this case requireth : and that afterwards the said late K. died, of the said messuage, and six acres of pasture so seised, if the law of England so requireth, without heir of his body begotten : after whose death the messuage afores. and the afores. six acres of pasture, parcel, &c. with the appurt. (amongst other things) descended to the Lady Mary late Queen of England, as sister and heir of the said late King Edw. 6. if the law of England in this case so requireth : by which the said late Q. Mary was seised of the messuage afores. and of the afores. six acres of pasture, parcel, &c. (amongst other things) in her demefne as of fee, in the right of her crown of England, if the law this requireth ; and the said late Q. Mary afterwards, and before the afores. time when, &c. died so thereof seised, if the law of England in this case so requireth, without heir of her body issuing, after whose death the messuage aforesaid, and the aforesaid six acres of pasture, parcel, &c. with the appurtenances (amongst other things) descended to the said lady the Q. that now is, as sister and heir of the aforesaid late Q. Mary, if the law of England in this case so requireth, by which the said lady the Q. that now is, was of the afores. messuage, and six acres of pasture, parcel, &c. with the appurtenances (amongst other things) seised in her demefne as of fee, in the right of her crown of Eng. if the law of Eng. so thereof requireth : and the jurors afores. further say upon their oath afores. that after the afores. act of parliament afores. in the first year of the reign of the late King Edward 6. made, the aforesaid Gabriel Fowler occupied the aforesaid messuage, and six acres of pasture, with the appurten. parcel, &c. and continued, and was thereof seised in his demefne as of fee-tail, if the law of Eng. in this case requireth it, having issue of his body lawfully begotten, one Richard Fowler, and being so seised thereof continued the occupation aforesaid, if the law of England requireth it, and afterwards, and before the said time when, &c. that is to say, on the first day of May, in the 18th year of the reign of the said lady the now Q. at Bucks aforesaid, of such his estate, died thereof seised, if the law of England so requireth, by virtue of which the messuage aforesaid, and six acres of pasture aforesaid, with the appurtenances, parcel, &c. descended, if the law so requireth, to the aforesaid Richard Fowler, as son and heir of the said Gabriel, by virtue of which the said Richard Fowler afterwards, and before the said time when, &c. into the messuage, and six acres of lands aforesaid, with the appurtenances, parcel, &c. entered, and was thereof seised in his demefne as of fee-tail, that is to say, to him, and the heirs of his body lawfully begotten, if the law of England this requireth ; and the said Richard Fowler

Fowler being so seised of the messuage, and six acres of pasture aforesaid, with the appurtenances, parcel, &c. if the law of England this requireth, the said Richard afterward, and before the said time when, &c. that is to say, on the 10th day of March, in the 33d year of the reign of the said lady the now Queen, at Buckingham aforesaid, by his certain writing, bearing date the same day and year, sealed with the seal of the said Richard, and to the jurors aforesaid, in evidence shewed, for a certain sum of money, in the said writing specified, if the law of England this requireth, enfeoffed Francis Dayrell, and Edward Dayrell, Gent. of the messuage, and six acres aforesaid, with the appurtenances, parcel, &c. (amongst other things) to have to the said Francis and Edward, their heirs and assigns for ever, by virtue of which the said Francis and Edward, entered into the messuage, and six acres of pasture aforesaid, parcel, &c. and were thereof seised in their demesne as of fee, if the law of England this requireth; and being so seised thereof, if the law of England this requireth, the said Francis and Edward afterwards, and before the aforesaid time when, &c. that is to say, on the 18th day of June, in the 33d year of the reign of the said lady the now Queen aforesaid, at Buckingham aforesaid, if by the law of England this they could do, enfeoffed the aforesaid John Lambert, of the aforesaid messuage, and six acres of pasture, parcel, &c. with the appurtenances, to have and to hold unto the said John Lambert, his heirs and assigns for ever, by virtue of which the said John Lambert, after and before the aforesaid time, when, &c. that is to say, on the said 18th day of June, in the 33d year aforesaid, entered into the messuage and six acres of pasture aforesaid, parcel, &c. with the appurtenances and was, and yet is thereof seised in his demesne as of fee, if the law thereof so requireth: and the jurors aforesaid further say upon their oath aforesaid, that the aforesaid lady the Queen that now is, (as before is said), being seised in her demesne as of fee in the right of her crown of England, of and in the aforesaid messuage, and six acres of pasture, parcel, &c. if the law of England this requireth, afterward, and before the said time when, &c. that is to say, on the 27th day of May, in the 34th year of her reign, the said lady the now Queen, by her letters patent under the great seal of England, sealed to the jurors aforesaid in evidence shewed, whose date is at Westminster, the same day and year, in consideration of the good, true, faithful, and acceptable service to the said lady the now Queen before that time, by her well-beloved cousin Thomas Earl of Ormond and Ossory, done, and for divers other causes and considerations, the aforesaid lady the now Queen, then specially moving, as also at the humble petition, &c. of the said Earl, of her special grace, certain knowledge, and mere motion, gave and granted for her,

herself, her heirs and successors, to her beloved subjects Edmond Downing and Roger Rant, Gent. the messuage aforesaid, and the aforesaid six acres of pasture, with the appurtenances, in which, &c. (amongst other things) by the name of all that her late chantry, called Barton's Chantry, situate, and being in the parish of St. Peter, in the town of Buckingham, and all lands, tenements, rents, and hereditaments whatsoever, with their appurtenances whatsoever, situate, lying, and being, in the said town of Buckingham in the aforesaid county of Bucks, to the said late chantry, called Barton's Chantry, belonging, or appertaining, or to the maintenance of a Chaplain or Priest, and other uses superstitious in the church of St. Peter aforesaid, according to the ordination of John Barton the elder, before then given, bequeathed, limited, or appointed, to have, hold, and enjoy, to the said Edmond Downing, and Roger Rant, their heirs and assigns. to the only and proper behoof and use of the said Edmond and Roger, their heirs and assigns for ever, yielding and paying to the said lady the Queen that now is, her heirs and successors yearly for ever, 13 pounds and 12 pence, of lawful money of England, to the hands of the Receiver-general of the county aforesaid, for the time being, or at the receipt of the Exchequer of the said lady the Queen, her heirs and successors, at the feasts of St. Michael the Archangel, and the Annunciation of the Blessed Virgin Mary, by equal portions every year to be paid, for all rents, exactions, services, and demands whatsoever for the same, to the said lady the Queen, and her successors, any ways to be rendered, paid, or done: and the said lady the now Queen, by her said letters patent, for herself, her heirs, and successors, granted unto the said Edmond Downing and Roger Rant, that the said her letters

[103] patent, or the enrolment of them, should be of force, firm, sufficient, and effectual in the law, against the lady the now Queen, her heirs and successors, as well in all courts as elsewhere within her realm of England, without any confirmations, licences, or tolerations, by the aforesaid lady the Q. that now is, her heirs or successors, thereafter by the said Edmond and Roger, their heirs or assigns, or by any of them, to be procured or obtained, notwithstanding the ill-naming or ill-reciting, or non-reciting the aforesaid several manors, rectories, messuages, lands, tenements, and other all and singular the premises, or any parcel thereof, notwithstanding the not finding of office and inquisition of the premises, or of any parcel thereof, by which the title of the said lady the now Queen, ought to be found before the making of her letters patent aforesaid; and notwithstanding the not reciting, or ill-reciting of any demise or grant of the premises, or of any parcel thereof before then made, being of record, or not of record: and notwithstanding any defects

fects of the certain composition or declaration of the yearly value of the premises, or not declaration of the yearly value of the premises, or any part thereof in the said letters patent expressed and contained; and notwithstanding other defects in not naming, or ill-naming any tenant, farmer, or occupier of the lands, tenements, or hereditaments aforesaid, or any part thereof, or not rightly naming any town, hamlet, parish, or county in which the premises or any parcel thereof be, and also in not naming the premises or any parcel thereof in nature, kind, or quality; by virtue of which said letters patent, the aforesaid Edmond Downing and Roger Rant, were seised of the aforesaid messuage and six acres of land, parcel, &c. with their appurtenances (amongst other things) in their demesne as of fee, if the law of England this requireth, and being so seised thereof; if the law of England this requireth, the said Edmond Downing and Roger Rant, by their certain indenture made on the 28th day of July, in the 34th year of the reign of the lady the now Queen aforesaid, between the aforesaid Edmond Downing and Roger Rant of the one part, and one Robert Snelling of East Horsly in the county of Surry, Gentleman, and Thomas Butler of Gray's-inn in the county of Middlesex, Gentleman, of the other part, for a certain sum of good and lawful money of England, to them beforehand by the aforesaid Rob. Snelling and Tho. Butler well and truly paid, gave, granted, sold, bargained, and confirmed, to the aforesaid Rob. Snelling and Tho. Butler, their heirs and assigns for ever, the messuage aforesaid, and the aforesaid six acres of pasture, parcel, &c. with the appurtenances (amongst other things) to have and to hold to the aforesaid Robert Snelling and Thomas Butler, their heirs and assigns for ever, as by the indenture aforesaid, inrolled in the Close-roll of the Chancery of the said lady the now Queen, on the 10th day of December, in the 35th year of the reign of the said lady the now Queen, to the jurors aforesaid in evidence shewed, amongst other things it more fully appeareth: by virtue of which said indenture and the inrolment thereof, the aforesaid Robert Snelling and Tho. Butler, were seised of the aforesaid messuage and of the aforesaid six acres of pasture, parcel, &c. with the appurtenances, in which, &c. amongst other things, in their demesne as of fee (if the law of England in this case requireth it) and the aforesaid Rob. Snelling and Tho. Butler, being so seised thereof (if the law of England this requireth) afterward and before the time when, &c. that is to say, on the 23d day of May, in the 36th year of the reign of the said lady the now Queen aforesaid, entered into the aforesaid messuage, and the aforesaid six acres of pasture, parcel, &c. with the appurtenances, and were seised thereof in their demesne as of fee, if the law of England so requireth, and being so seised thereof, the aforesaid John Lambert continuing his possession aforesaid, if
the

the law of England this requireth, the said Rob. Snelling and Tho. Butler, on the aforesaid 23d day of May at the said town of Buckingham demised and to farm let the messuage aforesaid and the aforesaid six acres of pasture, parcel, &c. with the appurtenances (amongst other things) to the afores. Theoph. Adams, to have to the said Theoph. Adams, his executors and assigns, from the aforesaid 23d day of May, in the 36th year of the reign of the said lady the now Queen aforesaid, until the end and term aforesaid of ten years fully to be complete and ended: by virtue of which the said Theoph. Adams into the messuage aforesaid, and into the aforesaid six acres of pasture, parcel, &c. with their appurtenances (amongst other things) afterwards, that is to say, the 16th day of April, in the 39th year of the reign of the said lady the now Queen, entered and was thereof possessed, if the law in this case requireth it, upon whose possession of the said Theophilus thereof, the aforesaid John Lambert afterwards, that is to say, on the same 16th day of April, in the 39th year aforesaid, into the messuage aforesaid, and the aforesaid six acres of pasture, parcel, &c. with the appurtenances, entered, and the same Theoph. Adams from his farm aforesaid thereof, his term aforesaid thereof not yet ended, ejected, expelled, and amoved, and him the said Theophilus from his possession thereof held out, and yet holdeth out, as the said Theophilus before hath against him declared. But whether upon the whole matter aforesaid, found in form aforesaid, it shall seem to the court here, that the aforesaid John Lambert is guilty of the trespass and ejectment of the said Theoph. Adams, of and in the messuage aforesaid, and the aforesaid six acres of pasture, &c. with the appurtenances, or not, the jurors aforesaid are utterly ignorant, and thereof they pray the advice of the court here, &c. and if upon the said whole matter in form aforesaid found, it shall seem to the court here, that the aforesaid John Lambert is guilty of the ejectment and trespass to the said Theophilus of the messuage aforesaid, and the aforesaid six acres of pasture, parcel, &c. with the appurtenances, then the said jurors say, upon their oath aforesaid, that the aforesaid John Lambert is guilty of the trespass and ejectment thereof as the aforesaid Theophilus above against him thereof complaineth, and then they assess the damages of the said Theop. by the occasion of the said trespass and ejectment besides his charges and costs by him about his suit in this behalf put unto, to 12 d. and for his charges and costs to 12 d. and if upon the whole matter aforesaid, in form aforesaid found, it shall seem to the court here, that the aforesaid John Lambert is not guilty of the trespass and ejectment aforesaid, of and in the messuage aforesaid, and the aforesaid six acres of pasture, parcel, &c. with the appurtenances, then the aforesaid jurors say upon their oath aforesaid, that the aforesaid

John

John Lambert is not thereof guilty as the said John for himself above in pleading hath alledged; and farther the said jurors say upon their oath aforesaid, that the aforesaid John Lambert in nothing is guilty of the trespasss and ejectment afores. in 4 acres of pasture of the said 10 acres of pasture residue above supposed to be done, as the said John Lambert above in pleading hath alledged, &c. and because the court of the lady the Queen here of giving their judgment of and upon the premises, are not yet advised, day is given to the parties aforesaid before the lady the Queen at Westminster, until Friday next after the morrow of the Holy Trinity, to hear their judgment of and upon the premises, because the court of the said lady the Q. here, are not yet, &c. And so continued from term to term, until Tuesday next after the morrow of All Souls, to hear their judgment of and upon the premises, because the court of the said lady the Q. here, are not yet, &c. At which day, before the said lady the Q. at Westminster come the parties afores. in their proper persons, whereupon a'l and singular the premises being seen and fully understood by the court of the said lady the Q. here, and mature deliberation thereupon had, for that it seemeth to the court of the said lady the Q. here, that the afores. John Lambert is guilty of the trespasss and ejectment of the said Theop. Adams, of and in the messuage afores. and the aforesaid six acres of pasture, parcel, &c. with the appurten. therefore it is considered, that the afores. Theoph. Adams do recover against the afores. John Lambert his term afores. yet to come, of and in the afores. messuage, and the afores. six acres of pasture (parcel of the said ten acres of pasture) with the appurtenances, and his damages afores. by the jurors, in form afores. assessed, as also 25 pounds for his charges and costs afores. to the said Theoph. Adams by the court of the said lady the Q. here with his assent of increase adjudged; which said damages in the whole do amount to 25l. 2s. 8d. and that the said John Lambert be taken, &c. And likewise the afores. Theoph. Adams be in mercy for his false clamour against the aforesaid John Lambert for the rest of the trespasss and ejectment afores. whereof the said John Lambert is acquitted, therefore the said John Lambert as to the rest of the said trespasss and ejectment may go thereof without day, &c.

ADAMS and LAMBERT's Case.

Mich. 44 & 45 Eliz.

In the King's Bench.

Hern. 198.
Moor 648, 649,
650, &c.
1 Roll. Rep. 49,
50.

Lit. Rep. 111.

IN *Ejectione firmæ* in the King's Bench, between Adams and Lambert, which began Hil. 40 Eliz. Rot. 748, of lands in Buckingham within the county of Bucks, upon not guilty pleaded, the jury gave a special verdict to this effect; John Barton was seised of the said lands in fee, and made a feoffment in fee to perform his will, and afterwards by his will in writing devised the said lands to John Barton his younger brother for his life, *sub conditionibus sequentibus*, viz. quod idem Johannes durante vitâ suâ, inveniat unum capellanum pro anima dicti Joh. Barton senioris, & aliorum ecclesiâ Sancti Petri in vill' de Buck' quotidie celebratur: et voluit quod præd' Joh. frater suus annuatim durante vitâ suâ persolvat dicto capellano in præd' ecclesiâ pro sustentat' sua 6l. 13s. 4d. de exitibus & proven' tenementor' præd'. Et insuper voluit quod dict' Joh' frater suus durante vitâ suâ inveniat in vill' præd' 6 pauperis homines sive fæmin' ad orand' pro anima sua & alior' in testamento præd' nominat' singulis diebus imperpetuum: et quod daret qualibet septimana durante vitâ suâ cuilibet ipsorum pauper'. 4d. & etiam cuilibet ipsorum mansion' prout (Deo disponente) pro eis constituit & ordinavit: ac etiam quod idem Joh' frater suus totâ vitâ suâ inveniat unum lampad' ardent' singulis diebus & noctibus coram Sancto Romwaldo in ecclesiâ præd', prout modò inventus est & sustentatus; & quod idem Joh' frater suus durante vitâ suâ teneat seu teneri faciat anniversarium suum in ecclesia præd', in quo quidem anniversario inveniet idem Joh' frater suus annuatim duos cereos nocte ad Virige, & die sequente ad Miss. unum scilicet ad caput, & alterum ad pedes sepulturæ dict' testat' ardentem, quolibet cereo ponderante tres lib' quibus exequiis completis voluit

voluit quod totum id quod dictis cereis resid' fuerit, dimitat' & reman' altari S. Jacobi in ecclesiâ præd' super candelabrum ibid' existen' capellano cantar' suæ præd' singulis diebus festivis ad Miss. quamdiu durare poterit deservitur : et quod idem Joh' frater suus totâ vitâ suâ durante, inveniatur annuat' unum torcher' competent' ad altare præd' deservitur : et voluit quod omnia præd' tenement' post mortem præd' Joh' fratris sui integrè remanerent Marg. & Isab' sororibus suis, ad vitam earum & earum alterius diutius viven' ; sub conditione quod eadem M. & I. earum vita durant', faciant perimpleri & observari omnia onera superius limitat' in formâ præd'. Et post mortem præd' Marg' & Isab' voluit quod omnia præd' tenement' remaneant W. Fowler tenend' sibi & hæred' de corpore suo legitime procreat' ; sub conditione quod ipsi observent omnia & singula onera superscript' in forma antedict' imperpet', et si contingat præd' Will. Fowler sine hæred' de corpore suo legitime procreat' obire, tunc omnia & sing' præd' tenem' integrè reman' Joh' Somerton consanguineo suo & hæred' de corp' suo legitime exeun', sub conditione quod ipsi omnia & singula onera superscript' in formâ præd' perimpleant & observent imperpet' : et si ipsum Joh' Somerton, absque hæred' de corpore suo legit' exeun' obire contigerit, quod extunc omnia præd' tenementa integrè reman' Will' Purfrey & hæred' suis de corpore suo legit' exeun', sub condic' quod idem Will' & hæred' sui, faciant perimpleant & observent omnia & singula onera in formâ præd' imperpet' : remanere pro defect' hujusmodi exit' Magistro domûs S. Tho. Martyris de Acon' Lond' pro 40 ann' extunc prox' sequen' & plenar' complend' : et post term' ill' finit' reman' Magistro hospital' S. Barth. Lond' & success. suis pro 40 ann' extunc prox' sequen' & plenar' complend' : cui libet eorum sub condic', quod quilibet eorum Magistr' & success. suorum durante eor' term', faciant & perimpleant omnia & singula onera supra limitat' in formâ supradict' : et si contingat præd' Joh' fratrem suum durante vitâ suâ in perficiend' onera supradict' deficere, seu ill' non perimplere, aut omnia prædicta tenementa durante vitâ suâ non competent' sustentare & reparare, seu ea aut aliquam parcel' earund' alienare sive ad parvum valor' ea dimittere in præjudic' cæter' personarum in remaner' supradict' nominat' ; quod extunc bene licebit præf. Marg' & Isab' in præd' tenementa cum pertin' intrare, & ea retinere ut in reman' suo præd' absque contradic' alicujus, & quod extunc status præd' Joh' fratris sui omnino cessat, & nullius sit valoris : and the like condition or limitation of forfeiture is annexed to all the remainders in the same will, and if all in remainder forfeit, the said lands to remain to the said John Barton the testator, and to his heirs for ever. Suppartandum, &c. et quia hæc mea voluntas pro bono animarum patris & matris meorum, anima etiam mea animabusque fratrum, soror' parentum & benefactorum meorum edita fuit, & ordinata : precor & onero præd' fratrem meum, prout pro me & se voluerit respondere

quod ipse tota vita sua diligentèr supervideat gubernation' cantar' supradict' ; & quod omnia suprascripta & in hæc meâ ultimâ voluntate declarat' inviolabiliter perimpleant' & conservent : et quod notitiam fac' omnib' hiis qui in reman' præd' statum habebunt in dictis tenementis, ut ipsi cognoscant tenor' & effect' testamenti & ultimæ meæ voluntat'. Et volo quod feoffati mei de tenement' cum suis pertinen' quod mei pauperes homines modo inhabitant pro eo quod non est divisibile, faciant talem statum post mortem meam omnibus illis supranominat', prout habeant ex meo legato de & in tenementis in Buck' prædict', ad usum præd' pauperum ibid' habitan' supportand' reparationes illius tenementi præd' pauper' quoties indegerit : et quia dubito ne tenement' suprad' sufficiant ad supportand' omnia præd' onera, causa grandi custos reparation' eorundem, volo quod feoffati mei statim post mortem meam faciant talem statum omnibus illis supranominatis, de omnibus illis terris & tenementis meis in villis de Bourton, Moreton, Gavecot cum præbend' Lembergh, Thornborough, Hillesden, Waterstratford, Shaldeston & Foycote in com' Buck' ac de omnibus illis terris & tenementis meis in Worton in com' Oxoniæ, ac de uno tenemento meo in villâ Oxoniæ in quibus feoffati extiterunt, prout habent ex meo legato de & in tenementis de Buck' præd' : ita quod sufficienter omnia onera præd' possint sustentare, et etiam pro labore indelationabiliter percipere et obtinere. And this case was several times argued at the bar, and afterwards it was openly argued in court by Yelverton and Fenner Justices in one day, and by Gawdy and Popham Chief Justice in another. And in this case (which extends to all the parts in effect of the body of the statute of 1 E. 6. cap. 14.) these points were resolved. 1. Although in this case the land was devised to his brother for life, the remainder to his sisters, &c. between whom as was objected, was apparent consideration of nature, and blood and posterity in reasonable manner ; and altho' the deviser has limited what sum shall be employed upon the chaplain, obit, &c. by which his intent (as it was objected) appears to advance them of his blood (to whom he had devised the land) with the residue of the profits which remained, and whereof no certain disposition was made by him, that by the law, the land being devised to them, they should take the surplufage of the profits (of which no disposition was made) to their own use, and the apparent consideration of advancement of his blood expresses his intent, that after the divine services (as it was then thought) were performed, those of his blood should be maintained and relieved with the residue, wherefore his blood should have the land, and the chaplains, &c. should have pensions, and so in respect of the persons the land was not given to the King ; yet it was resolved, that wives, sons, daughters, sisters, cousins, and other dear

dear friends, were persons within this act; for if men as well in their lives, as by their testaments after their deaths, used to put and repose confidence in their kindred and dear friends, for their temporal goods, *a multo fortiori*, when they intend to dispose of their temporal possessions for the health of their souls (as it was then thought) they would convey them to those in whom they had the greatest confidence: and in these cases of divine service concerning the health of the soul, it shall not be intended any advancement or preferment of his blood, or any other earthly consideration, unless it is so declared by express words; but all shall be intended for the advancement and continuance of the intents and purposes expressed, *sc.* divine services as things without all comparison most worthy and excellent; and he who betrays such trust (the divine service being according to the law of God) is by many degrees a greater offender than he who doth not perform trust or confidence concerning temporal things, for he who robs his friend commits felony, and he who robs poor men of their living is a greater thief by the law of God, for *panis pauperum vita pauperum, & qui defraudat eos vir sanguinis est*: but though he who takes away any thing that is given for the divine and true service of God, *est sacrilegus, & omnium praedonum cupiditatem & scelera superat*: and although it appears by the preamble of the act, that the devising and phantasing of vain opinions of purgatory and masses satisfactory to be celebrated for those who were dead, was great cause of superstition and error in the christian religion, &c. yet forasmuch as the devisor and devisees in the case at bar were (as they were taught) persuaded that it was for divine service and the health of souls, it shall be intended that their intentions were to advance such uses, and not the private advantages of the devisees; and therefore it was resolved, that the person, be he of blood or not, single or corporate, or politic, to whom the land is devised or conveyed, is not to be respected, but all is one within the purview of this act. And this was resolved, as to the persons of the devisees, feoffees, &c. within this act. 2. Although it was objected, that forasmuch as the land was devised for life, the remainder in tail, and a reversion of the fee expectant to the heirs of the devisor was not devised, and the letter of the act is, "to the finding of any Priest to have continuance for ever," upon which it was said, that an estate for life and an estate tail, which were estates limited and determinable, were not within the letter or intention of this act, *& eo potius* because the makers of the act by the first branch have provided, when a Priest was appointed to be found for ever, and by another branch subsequent, when he was to be found for years,

Postea 116. a.

Co. Lit. 342.
8 Co. 131. a. b.

Duke 91.

ADAMS and LAMBERT's Case. Part IV.

by which special and precise enumeration of these two cases, the makers of the act intended to exclude estates in tail, and estates for life, so that estates in tail and for life *sunt casus omitti* as it was said: yet it was resolved, that estates in tail and estates for life also were included by equity and meaning within the former branch, for the intent and meaning of the act, as appears by the preamble, was to extirpate out of men's minds these superstitious errors, and to take them utterly away, in what manner, or for what time they were given, and not to take them away only which were appointed to have continuance for ever, and leave those to have essence which were determinable or limited for a time: and forasmuch as the statute by express words abrogates and takes away all such superstitious uses which were to have continuance for ever, by equity and good construction it extends to every less time whatsoever. Also it was said, that the statutes say, "by any manner of assurance, conveyance, &c. for ever," and by common possibility an estate tail may continue for ever. Also in this case at bar the intent of the deviser was (as appears by his will) that the Priest should be found for ever, for he appoints also his right heirs to find him: and if such construction should not be made, the mischief intended to be remedied by the act would remain, against the intent and meaning of the act; and in the clauses of obits, the words are, "to have continuance for ever." And yet it was agreed in the case of Winchester, that an obit being appointed to be found for eight years was included within the equity of the act: so it was resolved 22 Eliz. in the Dean of Paul's Case, that a college or chauntry in reputation, although it wants sufficient foundation and incorporation in law, was given to the King by the said act, and the reason was, because the intent of the makers of the act was to take away all superstition out of men's minds, and not to suffer any to have continuance; and superstition was maintained as well in reputative chauntries, as in others; and yet it was not within the letter of the act, for in judgment of law it was no college nor chauntry; for *reputatio est vulgaris opinio ubi non est veritas*. And this was resolved as to estates devised to superstitious uses within the purview of this statute. 3. Where it was objected, that this devise of the land was not to the intent to find a chauntry or stipendiary Priest, or to the finding of a Priest as the statute speaks, but was upon condition to find him, so that if the Priest shall not be found, the estate shall cease, and the third branch of the act doth

Duke 91, 107.
Lane 101.

Duke 92, 10 Co.
83. b. 11 Co. 13.
a. Dy. 368. pl.
47. 4 Leon. 156,
157. Goldsb. 93,
Jenk. Cent. 245.
1 Roll. Rep. 127.
Postea 108, a.

2 Inst. 668.
Postea 107. b.

doth not speak of any estate conditional, but only where the priest was to be found for ever; and therefore an estate conditional shall be out of the purview of the act: But it was answered and resolved, that it was within the said act, for when the land is devised upon condition to find a Priest, without question this land is devised, "to the finding of a Priest, &c." as the statute speaks. And it is a stronger case, where it is devised upon condition, than where it is devised to the intent, or for the finding of a Priest, for the condition is more compulsory and penal for the maintenance of things prohibited by the law. *Nota* reader, there is one proviso *versus finem actus*, by which is provided, that it shall not be lawful for any person by reason of any reversion, use, or condition, to enter, or claim any land for not finding of any Priest, or poor men, obit, anniversary, light, or lamp, after the said act to be found or done. By which it appears, by the judgment of the whole Parliament, that land given upon condition or other determination, and all estates whereof there were reversions expectant, be they estates tail, for life, or any other particular estate, were within the act. And this was resolved for the manner of conveyance or assurance of lands to superstitious uses within this act. 4. It was resolved, that all the land in this case was given to the King by the said act, which was the principal point of the case, and of great consequence, and that for divers reasons; for the better understanding of which, five of the first branches of the act are to be considered. 1. Are given to the King, "All manner of colleges, free chapels, and chauntries, &c. 2. All manors, lands, tenements, &c. belonging to them or any of them. 3. All manors, lands, tenem. &c. by any mean assurance, conveyance, &c. given, assigned, limited, or appointed to the finding of any Priest to have continuance for ever, and wherewith or whereby any Priest was sustained, maintained, or found, within five years, &c. 4. And also all annual rents, profits, and emoluments at any time within five years, &c. employed, paid or bestowed toward or for the maintenance or finding of any stipendiary Priest for ever. 5. Shall be in the actual and real Possession of the King, &c. in as large and ample manner and form, as the Priest, Wardens, Masters, Ministers, Governors, or other incumbents of them within five Years, &c. had occupied or enjoyed the same, and as though the colleges, free chapels, chauntries, stipends, salaries of Priests, and the said manors, lands, &c. were in this act specially, particularly, and certainly rehearsed, named and expressed by express words, &c." And the consideration of every of these clauses was requisite for

Duke 91. 107.

Duke 91. 107.

1 Co. 24. b.

the deciding of this point, for the true exposition of one of them serves very well for the good understanding of the others: as to the first clause it was resolved, that some of the colleges, chauntries, &c. which were not lawfully founded, but were only in reputation, were given to the King by the said act, and some not, and therefore this difference was agreed; that where the college, chauntry, &c. had such beginning which might have made a lawful foundation, but for error or imperfection in the penning or proceeding of it, was not in judgment of law lawfully founded, such college or chauntry is given to the King by the said act: but when there is a college or chauntry only in vulgar (a) reputation, without any commencement or countenance of a lawful foundation, or erected by such means which cannot make a lawful foundation, there such college or chauntry is not given to the King by this act. *Nota* reader, the rule is, *Quod (b) reputatio est vulgaris opinio ubi non est veritas, & vulgaris opinio est duplex; sc. opinio vulgaris orta inter graves & discretos, & quæ vultum veritatis habet; & opinio tantum orta inter leves & vulgares homines absque specie veritatis:* and according to this distinction it has been adjudged and resolved by all the Justices upon this first branch of this act: and therefore Hill. 6 & 7 E. 6. Dyer 81. which was immediately after the making of the said act, the case was, that Pope Urban at the request of Ralph, Baron of Greystock, founded a college of a Master and six Priests resident at Greystock, and assigned to each of the Priests five marks *per Annum*, besides their bed and chamber, and the Master 40*l* *per annum*, and and it was certified into the book of first-fruits and tenths *reſtor. & colleg. de Greyſt.* that this college was *in eſſe* within five years before the said act; and it was resolved "by the "Justices," that this reputative college was not given to the King by the said act of 1 E. 6. because it wanted a lawful beginning, and the countenance also of a lawful commencement; for the (d) Pope cannot found or incorporate a college within this realm, nor assign nor licence others to assign temporal livings to it; but it ought to be done by the King himself, and by no other, *nomen non ſufficit, ſi res non ſit de jure aut de facto*, and it is as much as if one of his own head had erected and founded a chauntry without licence or authority derived from the King: but Mich. 9 & 10 Eliz. Dyer (e) 267. where the case was, that King E. 1. anno 12 of his reign, by his letters patent under the great seal, granted to Thomas Beale then Bishop of St. David's and his successors, the advowson of 34 churches in Wales within his diocese, to hold of the King and his successors, so that the Bishop and his successors might appropriate them, or any of them, to their churches of St. David's

(a) Cro. Jac. 51.
1 Roll. Rep. 127.
Lit. Rep. 131.

(b) Antea 106.
b. 2 Inst. 668.

The case of
Greystock Col-
lege.

(c) Dy. 81. pl.
64. Dyer 267.
pl. 13. Stiles 52.
Lit. Rep. 108.
10 Co. 34. b.

(d) 5 Co. 29. 2.
Cawdry's Case.

The case of the
College of Lan-
dwybrevie.

(e) Moor 650.
10. Co. 34. b.
Dy. 267. pl. 12.
13. Hob. 123.
Palm. 125.
1 Roll. 463.

vid's and Aberguelley, or make and annex Prebends of them in the said churches of St. David's and Aberguelley, as to them should seem most convenient; and three years after, the Bishop, by the King's assent (as the Bishop in his instrument affirmed) of the chapter of St. David's, erected and established a college, or church collegiate, & *quidquid celebratur collegii deponit auctoritatem suam supplevit in Landwybrevy*, being one of the thirty-four churches, and ordained thirteen Canons secular there, *sc.* five Priests, four Deacons, and four Subdeacons, and made them Prebends and Prebendaries, and annexed and appropriated thirteen of the said churches to them, &c. and reserved to the Bishop of himself and his successors as Dean, *locum in choro*, & *voce in capitulo*, and also visitation and corrections, &c. In which the Bishop did not pursue the authority and power given him by the said letters patent, for by them no power was given him to found such college; and afterwards King E. 3. by his letters patent reciting the said foundation and erection of the said college, and all other the premises, with some doubt of the validity of it, by his said letters patent granted and confirmed to the then Bishop of St. David's and his successors, all that which his said predecessor had done in the premises, the statute of Mortmain, or any statute notwithstanding; and notwithstanding the said college was erected or founded, and the appropriations made without the King's licence; which grant and confirmation being made to the Bishop and his successors, could not make the said college (which wanted lawful erection and foundation) good in law; and yet by those precedences the said college of (a) Landwybrevy continued a college in reputation till 1 E. 6. And it was resolved by the Justices of both benches, that this college was given to the King by the said act of 1 E. 6. because this college had the countenance of the King's letters patent, although they for the causes aforesaid were not of effect, and the statute saith, "All and all manner of colleges, &c." And such reputative college is within the said act, and power is given to commissioners by the said act to establish a Vicar in every college which was a church parochial, and so upon this difference concerning reputations, it was resolved in the case of the Dean of Paul's, Pasch. 22 Eliz. between Burton and Wilford, by Wray Chief Justice, Sir Thomas Gawdy & *totam curiam* of King's Bench, which case is for other points shortly touched in 22 Eliz. Dyer 368. And so in this case at bar it was resolved, although the devisor calls it his chauntry twice in his will, as appears before; for he wills that the devisee shall find two tapers burning at his anniversary, and that which remains the Chaplain of his said chauntry shall have: and afterwards he charges the devisee to oversee the government of his said chauntry,

(a) Hob. 123.
Antea 106. b.
Dyer 386. pl. 47
4 Leon. 156,
157, &c. Golsb.
93. 10 Co. 83.
b. 11 Co. 13 a.
Jenk. Cent. 245.

(a) Moor 650.

(b) F.N.B. 209.
L.

(c) Moor 649.

(d) Dyer 233.
pl. 13.

try, and that it was commonly called Barton chauntry; yet because it had not any commencement or countenance of a commencement of an erection or foundation of a chauntry, these lands were not given to the King by the first branch of this statute. Also although in the proper words of the law, a chauntry may consist of a Priest singing for souls (whence he is called a chauntry Priest) without any incorporation, as appears by F. N. B. (a) 209. L. and the register, that if a man give lands to a religious house or other, to find a Chaplain singing divine service, if he ceases for two years, the lord shall have *cessavit pro cantaria*, and the writ shall say, *Ad inveniendum quendam canonicum pro animabus antecessorum, &c. divina celebrantem*. So in the statute of W. (b) 2. c. 41. such finding of a chauntry Priest is called a chauntry, for there it is said, *Et si forte tenementum sic datum pro cantaria, luminare, &c.* and yet it is not any corporation of a chauntry: although in 40 Aff. 26. where a man devised lands to H. C. and his heirs, to find yearly twelve marks to two Chaplains to pray for souls, these are called chauntry lands by Knevet Chief Justice, 43 (c) Aff. 27. yet within this first branch such chauntry is only intended when the chauntry is lawfully incorporated, or at least has the countenance, or beginning of a corporation, and that for divers reasons as after appears: and so it was resolved what manner of chauntries, colleges, &c. were given to the King by this act, and what not.

As to the second clause, it was resolved; 1. That those words were necessary to be added, for otherwise by the gift of the college, chauntry, or free chapel, nothing would be given to the King, but the scite of the college, or chauntry, or free chapel, as is agreed 7 Eliz. Dyer (d) 233. b. & 29 Aff. 53. Secondly, this second branch explains, that they ought to be incorporations in law, or in reputation as is aforesaid, or otherwise land, &c. could not belong to them: and when lands are devised to certain persons (as in the case at bar) to find a Chaplain, the land doth not belong to the Chaplain, but to the devisees, and here the Chaplain has but a pension, and the devisees have the lands.

As to the third branch, it was resolved, that as the first branch extends only to colleges and chauntries, which are of some manner of incorporation or foundation as is aforesaid; so this third branch extends to cases, where lands are given to find a Priest without any foundation or incorporation: but it was objected, that in the case at bar in respect of the certainty of the sum appointed to the Priest that it was out of this third branch, and within the

the fourth and fifth branches; for the third branch (as was objected) extends only when the land is given, limited or appointed to the finding of a Priest to have continuance for ever: but in the case at bar nothing is limited or appointed to the Priest, but a certain stipend of 6 *l.* 13 *s.* 4 *d.* *pro sustentatione sua*: and therefore it was said, if lands of the value of 20 *l.* *per ann.* are given to find a Priest, and that the Priest out of the issues and profits of the land shall have 10 *l.* for his sustentation, it was said this case was out of this third branch, and within the express letter of the fourth branch, for here is the yearly sum of ten pounds, which was yearly profit within five years employed for the maintenance and finding of a stipendiary Priest for ever; and in the case at bar he is but a stipendiary Priest, because his stipend was certain. But if lands of the value of 20 *l.* *per ann.* are given to find a Priest without any limitation in certain, and the feoffees employ 10 *l.* in certain upon him, yet it was there agreed, that all the land was given to the King, because the gift was directly within the third branch, and not within the fourth for the incertainty. It was likewise objected, that the fifth clause doth greatly enforce this case, for thereby it appears, that all that which the Priest had, the King shall have; "in as large and ample manner and form as the Priest at any time within five years, &c. had occupied and enjoyed the same." And in this case the Priest within the five years, nor any time before, had not by the limitation aforesaid, nor could have above the sum of 6 *l.* 13 *s.* 4 *d.* and to prove their pretence the case of the Dean of Paul's, 22 Eliz. fo. 368. was cited, were the case was, that the executors of A. B. according to the will of their testator, anno 6. E. 2. assigned and conveyed lands and tenements to the value of 14 *l.* *per ann.* to the Dean and Chapter of St. Paul's, to find a competent sustentation yearly of ten marks sterling, for a Priest and his Clerk to sing mass every day for the testator's soul and all christian souls in the church of St. Paul; and the said Dean and Chapter ought to find bread, wine, candles, and all other ornaments for divine service; and all the other profits of the premises by the executors were assigned to be employed for the yearly obit for the said testator in the said church; the Priest was maintained within the five years, and had 6 *l.* 13 *s.* 4 *d.* *per ann.* but the obit was not kept within the five years. And it was resolved by the Justices of both benches, and the Barons of the Exchequer, that the Queen should not have more than the 6 *l.* 13 *s.* 4 *d.* and that for two reasons. 1. Because the land was not belonging to any chauntry, but appertained to the Dean and Chapter of St. Paul's: also the words of the statute are, that the King shall have the land or rent *in tam amplis modo & formâ*, as the Priest himself had, and

Antea 106. b.
108. a. 10 Co.
83. b. 11 Co.
13. a. Dyer 368.
pl. 47. 4 Leon.
156, 157, &c.
Goldsb. 93.
Jenk. Cent. 245.
Moor 131, 264.

(a) 1 Co. 24. a.
26. a. 10. Co.
24. a. 34. a.
2 Rol. 787, 788.

and the Priest had not the land; and these in effect are the words of the book. The second objection was, that in this case there was a good use, *sc.* (a) 4 d. by the week to six poor men a-piece, which is good and charitable; and although it be added, *ad orandum pro anima sua, & aliorum in testamento præd' nominat' in singulis diebus*, yet forasmuch as that is not prohibited by any branch of the said act, it is but surplussage, and is no impediment to the good use: for if it shall be prohibited by any clause of the said act, it shall be by the branch concerning obits, *sc.* "to the finding of any anniversary, obit, "or other like thing, intent, or purpose." And it may be said, that this praying for souls by these poor men, is another "like intent and purpose;" but the conclusion of the sentence is, "in any church or chapel to have continuance "for ever:" so that the intent of the act was to prohibit all superstitious uses, which were public in churches for the general prejudice which might accrue by them; for *malum quo communius eo pejus*, and not to prohibit private prayers in their chambers, or other private places, which could not tend to so dangerous an example. Then the case is no other but that land of the value of 20 l. *per ann.* is given to the intents following, *sc.* to find a Priest to pray for souls, and that he shall have 10 l. of the profits of the land, and six poor men 4 d. a-piece a week for ever, in this case, this good use (as it was strongly urged) shall save the land, and the King shall have but that which was limited to the Priest, *sc.* 10 l. for it was not the intent of the act to take away the good use, but the land should remain with the feoffees to perform it, and so much as was limited to the superstitious use should be given to the King; and to prove this, divers cases were cited. First, a case in the King's Bench, *anno 21 Eliz. inter* (b) Hewet and Wotton for lands in Exeter, where the case was, that Gervase Luissant enfeoffed divers of the said lands, and willed that they should find a Priest to sing mass in the church of St. Mary every Sunday, and a *Dirge & Mass de requiem* once a year for his soul, and that they out of the issues and profits of the said lands should pay to the said Priest, 2 d. every week, and the residue of the profits to be employed upon books, vestments, and other ornaments of the church aforesaid, and it was adjudged, that although the land was given to find a Priest, yet forasmuch as his stipend was certain, and also was joined with a good use, that the land was not given to the K. by the said act, but only the stipend which the Priest had. Another case was adjudged in the same court, Trin. 30 Eliz. but it began *Paschæ 28 Eliz. Rot. 431.* in trespass between John (c) Chibnal plaintiff, and W. Witton and Chr. Witton defendants for an house in Fleetst called, "The Angel

(b) Duke 92.
Hewet & Wotton's Case.
Postea 114. b.
Moor 131.
1 And. 100.

(c) Duke 92.
Chibnal & Whitton's case.
Co. Ent. 197.
pl. 7. Postea 114.
b. 2 Sid. 15.

"sur

sur le Hoop; upon not guilty pleaded, and upon a special verdict found, the case was such; Bennet Harlewyn, 36 H. 6. by his will in writing devised to the Master and Brethren of the guild of Drapers of London 3s. 4d. yearly, to be employed for the relief of the poor brethren and sisters of the same guild, and devised the said house to the Parson and Churchwardens of St. Christopher's parish and their successors, *ad inde solvend' annuatim præd' reddit' 3s. 4d. per me superius concess', & quod ipsi de exitibus inde solvant annuat' qualibet septimana uni capell' in eccles. S. Christopheri missam celebrand' imperpet' pro anima mea, 3d. Et quod solvant qualibet septimana tribus pauperibus ejusdem parochiæ 6 d. ad orandum pro anima mea; et quod celebrari faciant annuat' unum anniversar' distribuend' 13s. 4d. in formâ sequenti, viz. cuilibet capell' interessenti illo anniversario 4 d. & quod 12 d. inde annuat' solvant custodibus operis ecclesiæ ad usum fabricæ corporis ecclesiæ, & 12 d. ad sustentationem fraternitatis S. Christopheri, residuum 13s. 4d. expendatur in pane & potu inter capell' & alios pauperes eo die anniversarii ad exorandum pro anima mea; ac quod gardiani habeant de exitibus inde 6 s. & 8 d. pro laboribus suis: residuum de exitibus reservetur in pixide ad sustentation' & reparationem dictorum teneamentorum & (cum opus fuerit) ad novam ædificationem eorund'; and all these where employed within the five years. And it was adjudged in that case the King should not have the land, and the reason (as was said) was because the 3s. 4s. to the poor of the guild of Drapers, and also the 6 d. to the other 3 poor of the parish (although the 3 poor were appointed to pray for souls out of the church, &c.) were good uses, and therefore the finding of a Priest gave not the land to the King. But yet it was resolved and adjudged, that this case at bar was within the said third branch of the act, and that the land was given to the King by the said act. And for the better and more perspicuous knowledge and understanding of the resolution of the Justices in this case, I am obliged, to avoid great prolixity and intricacy, to reduce all their reasons and causes of their resolutions to these six differences, all which necessarily concern the case at bar, as well for the confirmation of their resolutions, as for the confutation of all objections, and also for the true understanding of all the former resolutions and judgments, amongst all which by these differences excellent and perfect unity and agreement appear. The first difference was, if a man gives lands of the yearly value of 20l. to others, to the intent to find a Priest to pray for souls, and that the Priest shall have of the issues and profits of the lands 10l. for his salary, without any other limitation, that in*

that

Postea 114. b.
Cro. El. 709.
Moor 30, 31.

The 1 Diversity.
Duke 107. Cro.
Car. 455, 456.

Duke 107.
2 Roll. Rep.
205, 206.

• Antea 106. b.
The 2 Diversity
108. a. 109. a.
11 Co. 13. a.
Dyer 368. pl. 47.
4 Leon. 156, 157.
Goldsb. 93.
10 Co. 83. b.
Jenk. Cent. 245.
Mo. 131, 264.

that case all the land is given to the King; but if the land is given upon condition, or to the intent that the feoffees shall pay of the issues and profits of the lands 10 l. to a Priest to pray for souls without any other limitation, that the King shall not have the land, but only the rent of 10 l. out of the land; and the reason of this difference is, because the first case is within the third branch of this act, for the land itself was given to find a Priest, according to the letter of the act; and inasmuch as he was maintained with 10 l. of the issues and profits of the land, it was within the words subsequent of the said 3d branch, *sc.* "wherewith or whereby any Priest was maintained." For by the land and the profits of it he was maintained, and no use shall be intended but that which the donor expresses, and the maintenance or augmentation of it, and forasmuch as the land was given to find a Priest, although he limits in certain how much the Priest shall have for his salary and living, yet to the finding of a Priest to pray for souls, other things are necessary which are employed in such gift, *sc.* garments, books, wine, bread, &c. and the penning of these branches concerning finding of Priests, differs much from the penning of the other clauses concerning obits, for there the words of the first clause are, "given, assigned, or appointed, to go or be employed wholly to the finding or maintenance of any anniversary, &c." And the 2d clause is, "and where but part of the issues or revenues of any manors, lands, &c." But no such distinction is expressed within the branches concerning priests. And the reason of the second part of the difference, *sc.* when the feoffees are appointed to pay out of the land a certain sum to a Priest, &c. and because the land itself is not given upon condition, or to the intent to find a Priest; but the feoffees are limited or appointed to pay to the Priest 10 l. and therefore the King cannot have more than was given to the finding of the priest; and that was 10 l. as the Priest's stipend, and not the land which was not given for the maintenance, or finding of the priest; and therefore the King shall have the 10 l. only by force of the said fourth branch of this act; for that is in nature of a yearly rent, profit, or emolument; and therewith agrees the judgment in the said case of the Dean * of Paul's. The second difference was, if land of the yearly value of 20 l. *per annum* be given upon condition, or to the purposes following, *sc.* to find a priest to pray for souls, and that the priest shall have for his salary 10 l. and to distribute between twenty of the poor men and women other 10 l. yearly for ever for their sustentation, in that case

case the King shall have but the 10 l. limited to the Priest, and not the land : but if the same land had not been given to find a Priest, and for the maintenance of 20 poor men, in that case the King shall have all the land ; although in the employment the Priest had 10 l. and the poor the other 10 l. And the reason and cause of this difference is, because in the first case there was a good use separate and distinct from the superstitious use ; and therefore, God forbid that the ill use shall swallow up the good use, and a certain sum was appointed to the Priest, which sum the King shall have as a rent by force of the said fourth branch ; and in such case, if the land should be given to the K. the good use would be taken away, which was never the intent of the act ; for the intent of the makers was, as appears by the preamble, to advance and continue good and charitable uses, as grammar schools, augmentation of the universities, and provision for poor men, as is expressed in the preamble. And there is another clause concerning the continuance of such charitable uses in the body of the act, by which power is given to certain commissioners, " to assign in every place wherein any Guild, Fraternity, Priest, or Incumbent of any chantry, by the foundation, ordinance, or first institution thereof, should or ought to have kept a grammar school, or a preacher, &c." And also to enquire, " what money, profits, or benefit any poor person, by virtue of any conveyance, &c. had or enjoyed within five years, &c. out of any college, free chapel, or chantry, and other the premises given, limited, or appointed to the King by this act ;" and thereupon to make assignments to the poor : which clause is to be intended only when the provision for the poor is derived out of a superstitious thing, or to be performed by the person who was to do the superstition, as out of a college, or chantry, or free chapel, or when all the land was given to find a Priest, and that the Priest should find a grammar school, or preacher, or should pay so much to poor men : and in such case it was necessary to make such provision ; for the colleges, chantries, free chapels, and Priests praying for souls, who should make distribution to the poor, &c. were dissolved, and their possessions given to the King by this act. and therefore it was very well and necessary to add the said clause for continuance of the said charitable uses, but that it doth not extend to, when lands are given to divers feoffees upon condition, or to the purposes following, *sc.* to find a Priest, and of the issues of the land to pay him a certain stipend, and out of the residue of the profits, that the feoffees shall find a grammar school, or sustain poor

Hob. 124. Duke
107. Moor 165.
2 Roll. Rep.
206, 207. Cro.
Car. 249. Cro.
El. 449.

Co. Lit. 342. a.
1 Co. 24. b.

poor men, for these are not derived out of the superstitious use, nor to be distrubed by the superstitious persons, but by the feoffees, &c. who remain persons able to distribute, and continue the good uses, which are distinct from the superstitious uses; and the reason of the second part of the last difference, is, because nothing is limited to the superstitious use in certain by the donor, or devisor himself, so that if the King should not have the land, the King would have nothing, but the superstitious use would remain, and the intention of the act (as hath been said, and so it ought to be expounded,) was to take away all such superstition; for the King cannot have any rent in such case, for every rent ought to be a certain sum; and although in such case the feoffees have always employed a certain sum, yet they have not power to make alteration of the substance of the gift, but the intent of the donor shall stand. A 3d difference was taken, when the Priest has a certain salary, (and yet to the finding of him other things, as books, bread, wine, vestments, &c. as has been said, are *tacite* implied and requisite, which are incertain) and beside that a good use is limited, there the King shall not have all by reason of the implied incertainty; but if land is given to any exprefs superstitious use prohibited by the act, without limitation of any certainty for the finding of it, there all is given to the King by the said act; the reason of the first branch of this difference is, that a good use expressed shall be preferred before any thing implied, and incident to a superstitious use. 2. The finding of books, vestments, wine, and bread, are not of themselves superstitious, therefore the makers of the act did not intend to regard them, as appears by divers resolutions and judgments hereafter cited, but when the expressed intent was not only to find a Priest, but also a good use, there the King shall have only that which the Priest himself had, or which he was intended to have; the other part of this last difference, is agreed and resolved before. The 4th difference, or *potius* an explanation of the former differences was taken between a sole Priest to pray for souls within the third branch, and a stipendiary Priest within the fourth branch; for when lands are given to one or divers feoffees to find one single Priest with the issues and profits thereof, with a certain limitation of some sum for his sustenance, there, if no good use is limited (as hath been said) all the land is given to the King for the reasons aforesaid: but when a certain sum is limited to the Priest for his stipend, and beside that a good use is expressed, it amounts to as much as if the land had been given that the feoffees should pay a certain sum of money to a Priest, in which case he is a stipendiary Priest within the fourth branch of the act, and in such case the

(a) Cro. El. 449.

The 3 Diversity.
Cro. Car. 249.

Hob. 224.
Moor 266.

The 4 Diversity.

the King shall have but one rent. The fifth difference was taken, when a certain sum is limited to a Priest, and divers other uses are also limited, which of themselves are not prohibited, yet if they depend upon the superstitious use, all is given to the King. As if a man gives land of the value of 20 l. and that the feoffees of the profits of the land shall pay to a Priest 10 l. and the residue for vestments, books, bread, wine, &c. for the celebration of mass, &c. or to one or divers to visit, and see that the service be done, or for the reparation of the chapel in which the service is to be done, or for the repairing of the tenements, or to poor people to be present at it, or some such like intents or purposes which depend upon the superstitious use, or for an ornament or continuance of it, there, all is given to the King; but when the other uses are not depending upon it, but extend to distinct and separate good uses, there, the good uses shall save the land. As if land, to the value of 20 l. is given to pay a Priest ten marks to sing for souls in such a church, and the residue of the profits to repair the church although *that*, by a means concerns the continuance of the said superstitious use, forasmuch as it is to be celebrated in the same church; or in such case if the residue of the profits were limited for the finding of the ornaments of the church, although they are by a means, ornaments also for the celebration of the said superstitious use, yet in both these cases, inasmuch as the reparation of the church, or the finding of the ornaments does not depend upon the superstitious use, nor immediately concerns the superstitious use, in such case the land is not given to the King: so in the same case, if part of the profits are limited for the repairs of the church, or to find the ornaments of the church, and the residue of the profits are limited for the reparation of the houses so given, the King shall not have the land; for reparation of houses of themselves is not an use prohibited, and therefore being joined with a good use shall save the land, and yet, by a means, both concern the continuance of the superstitious use: but the statute is to be intended of immediate uses, and not only to suppress superstitious uses, but also to continue good uses, according to the intent of the makers of the act. The 6th difference was observed, when all the uses are superstitious, and when not; for when all the uses are superstitious, there, in what certainty or manner soever they are limited, and of what value soever the land is, yet all the land is given to the King. As if land of the value of twenty pounds *per annum* is given, to the intent, that ten pounds out of the issues and profits thereof

The 5 Diversity
Lach. 38.

Cr. El. 449. Cr.
Car. 249.

Cr. Car. 248.
456.

The 6 Diversity.

shall be paid to a Priest, 5 l. for the maintenance of the obit, and 5 l. to find lamps and lights before such images in such a church : in this case it was objected, that the King shall have but several rents, for the Priest was but a stipendiary Priest, and the land was not given to find him : also the clause concerning obits, &c. gives to the King but a rent, when but part of the profits are limited and appointed to it ; and therefore by none of the said several branches by itself the King shall have the land, but only the several rents : but it was resolved that in such case, all the land, by the equity and true construction upon all the said, act shall be given the King ; for inasmuch as all the profits are limited to superstitious uses, it was the intent of the act to give all the land to the King by a reasonable construction upon the coherence and intention of all the parts of the act : and as to the objection which was made, that the King in the principal case shall not have more than the Priest had, because the fifth branch, which is the conclusion of all the four branches precedent has such words, " In as large and ample manner and form as " the Priests, Wardens, Ministers, Governors, Rulers, or " other incumbents of them within five years, &c. had occupied or enjoyed : " it was resolved, that these words do not abridge that which before was by any of the precedent clauses given to the King. 2. That these words cannot be referred to the third clause, *sc.* when land was given to one or divers persons to find, with the issues and profits, a sole Priest, for there, the Priest had not the land ; and therefore if the said clause was restrictive, and if the King should not have more than the Priest had, the King would have nothing, for the Priest has nothing, and yet every one agrees, that the King in such case shall have the land. But these words are referred, *reddendo singula singulis*, to the first, second, and fourth branches ; for by the first two, the land, and by the fourth a rent is given to the King ; and therefore the said words may well be referred to them, and cannot be referred to the said fourth branch, for the King cannot have the land, " in " as ample and large manner as the Priest had it," when in truth the Priest had nothing in the land, but the feoffees were seised thereof ; or the said words refer only to the fourth branch concerning stipendiary Priests, as Popham Chief Justice held : and the case at bar was within all these differences ; for 1. The land was devised upon condition to find a Priest. 2. In this case one of the superstitious uses was uncertain, because, for the finding of lamps and lights no certain sum was limited ; and if all the land had been given to this uncertain use, the King should have had all the land. 3. Here was not any good use, for although the maintenance and sustentation of poor men was good, yet maintenance of them to pray for souls was superstitious, and prohibited by the
said

saïd act: and although these prayers are not appointed to be made in any church, chapel, &c. or other public oratory, yet it was resolved, that it was prohibited by the saïd act, or (as some held) directly within the words of the clause concerning obits, *sc.* "anniversary or obit, or other like thing, intent, or purpose, or of any light or lamp in any church or chapel:" so that these words, "in any church or chapel," are referred only "to lights or lamps," and not to these preceding words, "or other like thing, intent, or purpose." And praying for souls, is a "like intent" or purpose to an anniversary or obit, for all was to pray for souls, or (as others held) by the equity of the saïd act which intended to extirpate all praying for souls: and it seemed to some that the case is stronger, because the principal superstitious use is to be done in the church. 4. These prayers for souls by the poor men, are in a manner dependent upon the other superstitious uses, and of one and the same kind and nature with them. 5. In this case all the uses were superstitious, and therefore all the land was given to the King: and by these differences you may (as hath been saïd) better understand the judgments and resolutions which have been before these times, had upon the several branches of this act, and every one of them well stands with the other, and no contrariety amongst them. And all these differences are well proved and approved by former resolutions, decrees, and judgments; and therefore I will make a summary report of the former resolutions, decrees, and judgments, which were cited and vouched in this case, and first of the resolutions:

Sir Bartholomew Read, by his will in writing, devised his lands in London to the company of Goldsmiths, to the intent that they, with the issues and profits, should repair the tenements, and should pay all rents issuing thereout, and should keep an obit, and should spend at it yearly 33s. 4d. and find perpetually a Priest to sing mass for his soul, who should also keep a grammar-school, and chiefly for the poor, and to receive 10 l. yearly for his salary, and the saïd tenements were then of greater value, *sc.* of 50 l. *per annum* than the saïd superstitious uses. And it was resolved by Wray and Anderson, Chief Justices, upon conference with Sir Roger Manwood, Chief Baron, and Periam, Justice, that all the tenements were given to the King by the saïd act, for although there was a good and charitable use, *sc.* to find a grammar-school chiefly for the relief of the poor, yet because it was mixed with a superstitious use, and nothing in certain was limited to the good use, in such case the uncertain mixture of the bad use with the good use, infects the good use, as a little poison mixed with a great quantity

Sir Bartholomew Read's case. Moor 654

Hob. 127.
1 Rol. Rep. 417.

5 Co. 80. b.

Sir John Tate's
case. Duke 94.
Hern. 208.

of wine, or as truth mixed with covin (covin is so ill an herb) that it makes the whole unfavory, and turns the goodness of the one into the badness of the other, as it is said in Plowd. Com. 51. a. Secondly, the good use is derived out of the superstitious use, and to be performed by the Priest; and for these reasons the good use in this case shall not save the land. Also although now upon the matter, it is as if the good use had been omitted, and that a certain sum was limited for every of the uses, yet when all the certain uses were superstitious, all the land shall be given to the King. Another case was resolved by them, that Sir John Tate, seised of certain houses in London, by his will in writing, devised them to the company of Dyers to repair the houses, and to find a secular Priest for ever to pray for souls in the church of St. Michael in Cornhill, paying to him a competent living, not less than eight marks *per annum*, and the houses then were of greater value; and yet because it was uncertain what sum the Priest should have; and if the sum had been certain, yet because the land was given to find a Priest, and no good use was limited, the King shall have all the land by the said third branch of the said act.

John Allen's
case.
1 Anderf. 97.
Moor 264.

Another case resolved by them was, that John Allen, by his will in writing, devised houses in Eastcheap to the company of Goldsmiths, in London, to find an obit for ever, which houses then were, and so continued, of the value of 33l. 13s. 4d. *per annum*, and 23s. 4d. were only employed to the said superstitious use. And it was resolved, that the King should have all the land, for the devisees, by their certain employment, cannot save the land when the gift itself is uncertain; nor any disposition in certain by the devisees, can alter the nature and substance of the gift, nor the operation of the statute upon it.

Pele's case.
Duke 95.
Hern 209.

Another case was also resolved by them: one Pele devised by his will in writing, certain houses in London, to the company of Clothworkers of London, to the intent that they for ever should pay to such Priest who should pray for his soul in the parish church of Chilham, 9l. 6s. 8d. for his salary; the King shall not have the houses, for they were not given to find a Priest, but to pay to a Priest a certain sum.

Walpool's case.
Duke 95.
2 Sid. 14.
Hern. 209.

One Walpool, in 23 E. 3. by his will in writing, devised to the company of Goldsmiths in London, certain houses in London of the value of 30l. *per annum*, to the intent that they, with the issues and profits thereof, should find two Priests paying to each of them 6l. 13s. 4d. for his salary; and it was resolved by the said Justices, that the Queen should have the houses, for it was within the third branch of the act, inasmuch

inasmuch as the land was given to find two Priests, "and wherewith or whereby" they were maintained, &c. and forasmuch as no good use was limited, and all the use expressed was superstitious, for these reasons it was resolved, that the houses were given to the King, and yet the salaries of the Priests were certain.

Anno 4 H. 8. Will. Caley, by his will in writing, devised certain houses in London, of the value of 40 marks *per ann.* to the company of Drapers, to the intent to repair them sufficiently for ever, and of the issues and profits of them to maintain a Chaplain in the church of St. Mary Woolnauth, to sing mass every day for the souls of Rich. Shore and his wife, and to have for his salary 6 l. 13 s. 4 d. and to find an obit in the same church for the soul of the said Richard Shore, spending upon it 20 s. in form following, *sc.* the Wardens of the said company shall have part, and the Beadle part, and part to be spent upon bread, beer, and other necessaries, at Draper's hall, amongst the brethren there, and the residue to be distributed amongst the poor dwelling within the precinct of their hall, to pray for souls; and although the salary of the Priest was certain, and the expences of the obit were certain, and the prayers for the souls were to be made in Drapers hall, and not in any church or chapel; and the distribution of bread and beer amongst the poor, is of itself a good and charitable use, yet forasmuch as all the uses were superstitious, or depending thereupon, it was resolved, that the houses were given to the King by the said act.

Caley's case.
Moor 65^r, 654.
1 Ancti. 96.

Anno 5 E. 4. One Gregory, by his will in writing, devised his houses in London, of the value of four marks *per annum*, to the company of Skinners, to the intent, with the profits thereof, to find an obit for ever in the church of St. Anthony, spending at it 6 s. 8 d. and to distribute amongst the poor of the said parish, to pray for one soul, 6 s. 8 d. and with the residue of the profits to maintain the reparations, and with the overplus to new build them, when need should be: and although the sum for the said superstitious uses (whereof one was to be done out of the church or chapel) were certain, and the reparation and new-building of the houses themselves, were good, because they concerned the habitation of men; yet forasmuch as these uses were for the continuance of the superstitious uses, & *quodammodo* depending thereupon; for this reason it was resolved, that the houses were given to the King by the said act: several other resolutions of the said Justices were cited, but forasmuch as they all tend to the effect of those which have been cited before, to avoid prolixity I have omitted them. *Nota* reader, the branch of the said act next following the last clause of obits, concerning the employment of the sums

Gregory's case.

of money, or profit of any lands, by any corporation, guild, fraternity, company, or fellowship of any mystery, or craft, for the maintenance of a Priest, obit, &c. was but an explanation of the said fourth branch, to oust a scruple which some might conceive, whether a body incorporate might stand seized to such intents, and upon such trusts as is afore-said: but it appears by all the said resolutions, as well bodies politic and corporate as private persons, are within the former branches of the said act, for the letter of the act is general and includes all, as in this very case it is before resolved.

Now to proceed to decrees: In 5 E. 6. it appears in *libro decreti in officio rememor' Dom' Regis*, in the Exchequer, that divers decrees were made so upon the will of (a) Comberton in 5 H. 4. of Cromer (b) in 10 H. 6. of William Rus (c) in 11 H. 6. of one Penne in 5 H. 6. and of divers others in the Court of Augmentation; but because they are agreeable to the said resolutions and differences before taken, as I conceive, although they are not fully there written, I will omit them, and proceed to judgments given in the Queen's courts upon argument and great consideration judicially. And as to the cases of Hewet and (d) Wotton, and Chibnal (e) and Witton, they were affirmed to be good law, and that there were two principal reasons of the judgment in the same cases. 1. Because nothing was limited to the Priest but two-pence or three-pence every week, which was not within the said third branch of the act, for with such a small sum a Priest cannot be found or maintained. And the letter of the said statute is, "to the finding of any Priest, &c. and wherewith" "or whereby any Priest was sustained, maintained, or found;" and with such small allowance he cannot be sustained, maintained, or found. Also in one case he should sing mass but every Sunday, and *Dirige* once a year, which was (as was said) within the clause of obits, *sc.* "to such like intent or purpose." 2. Admitting that a certain salary had been to the Priest sufficient for his maintenance, yet because there were good uses (f) separate from the superstitious use, *sc.* in the one case 3 s. 4 d. to the poor, &c. and in the other, to find ornaments of the church; for these reasons judgment was given in both the cases, that the land was not given to the K. It was also adjudged for these two reasons, that were given in Hewet and Wotton's case (for the said two cases agreed with the said case of the Dean of (g) Paul's which the Lord Dyer has briefly touched in part) that the Queen shall not have the land for two reasons. 1. Because the land (b) itself was not given to find a Priest, so that it was not within the third branch of the act, but to find an annual sustentation of ten marks for a Priest,

(a) Moor 649, 652.

(b) Moor 652.

(c) Moor 649.

(d) Duke 92.

Antea 109. b.

Moor 131.

1 Anderf. 100.

Antea 109. b.

Duke 92.

Co. Ent. 197.

pl. 7.

2 Anderf. 15.

(f) Duke 92.

(g) Antea 106.

b. 108. a. 109. a.

110. b.

Dy. 368. pl. 47.

4 Leon. 156, 157.

Goldsb. 93.

10 Co. 83. b.

10k. Cent. 245.

Moor 131, 264.

(b) Duke 92.

so that it was within the fourth branch, and not within the third. 2. It was resolved in the said case of the Dean of Paul's, that if land is given to pay ten marks to a Priest, and 40 s. to the maintenance of an obit, in that case, if both are found within the five years, the King shall have all the land, because both the uses were superstitious by the judgment of the law, upon the coherence, (as has been said) of all the act; but in the same case because the obit was not found within the five years, it was therefore adjudged that the King should not have the land: and therefore in the same case of the Dean of Paul's, this difference was taken and resolved, when certain sums are limited to the superstitious uses, and one use is separate and divided from the other, there, the finding of the one shall not give the whole land to the King, but only the sum appointed to the superstitious use which was employed within the five years: but if the one use depends upon the other, there, the finding of the principal, or any part of it, gives all the land to the King. As if land is given, to the intent that an obit shall be found in such chapel, and that upon the obit 10 s. shall be distributed and employed to the Priest, and to divers poor persons who shall be present at it, 6 s. 8 d. and the rest of the profits to the reparation of the said chapel; in this case, if the obit is maintained in any Part within the five years, although the 6 s. 8 d. is not employed to the poor men, nor any thing upon the reparation of the chapel within the five years, yet all the land shall be given to the King, because all the uses depend upon the first: so in the same case, Wray, Chief Justice, said, that it was adjudged, that where certain houses called the Bull were given to find a Priest to pray for souls, &c. and other tenements called the Swan, were given to the same feoffees to find an obit, &c. and the feoffees employed the profits of the said several houses to contrary uses, *sc.* the profits of the Bull to find the obit, and the profits of the Swan to find the Priest, yet forasmuch as the original gift was superstitious, and the employment superstitious, although the employment did not pursue the gift, yet in both cases such employment within the five years was sufficient to give the land to the King. So if a man gives the manor of Dale and (c) the manor of Sale to find superstitious uses, and the feoffees with the profits of the one manor find the superstitious uses, and employ the profits of the other to the use of the poor inhabitants of the same town, or to bear the common charges of the town, yet both the manors are given to the K. for if the feoffees employ any part of the profits of the lands which they have, and which were given for the maintenance of the superstitious uses, all is given to the K. but if the feoffees, before the five years, have conveyed part of the land to another in fee, and employ the profits

(a) Antea 106.
b. 108. a. 109. a.
110. b. 114. b.
Dy. 368. pl. 47.
4 Leon. 156, 157.
Goldsb. 93.
10 Co. 83. b.
Jenk. Cen. 245.
Moor 131, 264.

The case of the
Swan and Bull.
(b) Duke 93.

(c) Duke 93.

of that which remains in their hands, for the maintenance of the superstitious uses, and no part of the profits of the land of the second feoffee is employed within the five years, there the King shall not have the land of the second feoffee, but only the lands which the first feoffees have, for the employment by the first feoffees of the land which they had, cannot bind the second feoffee, for the land in which they had not any estate or interest; and that well stands with the words of the said third branch, *sc.* "To the finding of any Priest, and " wherewith or whereby any Priest was sustained, maintained, or found within five years:" for as to the land conveyed to the second feoffee (whereof no part of the profits was employed to superstitious uses within the five years) that is not within the said words of " wherewith or whereby," for neither with nor by the land of the second feoffee the superstitious uses were found within five years, but only with, and by the land which remains with the first feoffees; and in the said case of the Dean of Paul's, some held that a proviso that the said act shall not extend to the manors, lands, tenements, or other hereditaments of any cathedral church, " other than to such chauntries, obits, or lamps, or any of " them within five years, &c." And in the said case, the land was parcel of the possessions of a cathedral church; and the said land did not appertain to a chauntry, *sc.* within the first or second branch, but that case was within the fourth branch, to which this word of the proviso (chauntry) doth not extend; and as to the words obits, &c. forasmuch as but part of the profits was assigned thereto, although the obit had been found, that the land was not thereby given to the King.

Turner's case.

(a) Co. Ent. 275.
pl. 11. Mo. 131.
653, 659, 264.
1 Anderf. 100.
2 Siderf. 46.

Trin. 18 Eliz. Rot. 142. in an information of intrusion against Lucas and Collier, upon the general issue, a special verdict was found to this effect; Turner seised of certain houses in London in fee, of the yearly value of 4 l. 6 s. 8 d. anno 3 H. 6, devised them upon condition to find an obit within the parish of St. Mary Pattens in London, " spending thereat so much as the devisees would in their discretions," the devisees expended only upon the obit 6 s. 8 d. *per annum*, and it was adjudged that the Queen should have the houses; 1. Because the appointment was uncertain, although the employment was certain. 2. That all (b) the use expressed by the deviser, was superstitious: and therefore it was said, if land to the (c) value of 50 l. is devised to find an obit, spending upon it 3 l. *per annum*, although a certain sum is limited, yet forasmuch as the land is given to find an obit, and no other use is expressed, the land in such case shall be given to the King, for the land is given in the same case wholly (as the statute speaks) to find an obit, and therefore within the first branch of obits.

(b) Duke 93.

(c) Duke 93.

Colborn and Dale's case.

(d) Co. Ent. 207.
pl. 17.
Moor 653, 649.
1 And. 99, 100.
2 Siderf. 46.
Hern. 193.

Trin. 20 Eliz. Rot. 589 *inter* Colborn and (d) Dale in B. R. upon demurrer the case was such; Tho. Wells 12 E. 4. devised divers

divers houses in London, of the yearly value of 24 l. to his wife for her life, the remainder to the Parson and Churchwardens of St. Edmond's and their successors; and devised that his wife during her life, and after her decease, they in remainder should find a Priest who should perform divine service at the altar in the chapel of our Lady in the church of St. Edm. for the souls, &c. and that the same Priest should be aiding and helping at divine service in the same church, and devised, that his wife during her life, and those in remainder after her death should pay him for his salary 6 l. 13 s. 4 d. Further he devised that they should find an obit with 6 Priests and appointed 22 s. in certain to be employed upon it, whereof part should be distributed among the poor of the trade of Drapers, which *should* come to the said obit, and could not come. Also he appointed 16 d. yearly to the parson of St. Edm. for beading of beads; every Sunday 3 s. 4 d. to the Friars of St. Augustin to pray for his soul; also 4 s. yearly to be paid to the preacher at Paul's upon Good Friday; to 3 preachers of the Spittal to commend his soul to the prayers of the people, 13 s. 4 d. also 3 s. 4 d. to the Warden of the company of Sheermen to distribute amongst the poor almsmen of the same trade, to the intent that those of the Wardens, with 8 or more of the said Company, upon warning, *should* come to his obit: also he appointed accounts yearly to be taken, and that the Churchwardens of St. Edm. should have the letting and setting of the lands: and the C. Ws. of St. M. Woolnauth should come yearly and have for their pains 6 d. a piece. And the C. Ws. of St. Edm. to have 6 s. 8 d. And 11 s. 4 d. yearly he appointed for the finding of books, vestments, and ornaments of the chapel, where he appointed his obit to be celebrated, and that all the revenue coming of the premises should be in several keeping, separated from other monies in a chest, for the reparation and new building of the tenements. And it was adjudged, that the said houses were given to the K. by the said act. In which judgment these things were observed: 1. That the devise was to his wife. 2. That it was a devise to his wife for her life. 3. That every superstitious use had a certain sum limited and appointed for the maintenance of it. 4. That all the uses were either superstitious, or were depending upon the superstitious uses, or tending to the maintenance or continuance of them; and that was the principal cause and reason of the judgm. *Trin. 30 El. Rot. 709. inter Adams & Stokes, in B. R.* upon demurrer the case was such: Walter Dunston devised lands to the Parson and C. Ws. of St. Botolph's, upon condition to find a Priest, and that he should have for his salary 6 l. of the issues and profits of the lands. Also he devised yearly for ever 13 s. 4 d. to the prisoners of Newgate and Ludgate, at the day of his death, to pray for his soul, besides the said sole Priest; and the residue for the reparation of the tenements, and to augment the Priest's portion. And it was resolved, that the land was given to the King by the said

Antes 105. b.
106. a.

Adams & Stokes's
Case.
Hern. 194.

ADAMS and LAMBERT's Case. Part IV.

said act; for the praying for souls by the said prisoners, altho' it was out of church and chapel, was superstitious; and the augmentation of the Priest's maintenance uncertain. And this resolution was affirmed for good law by Popham, Chief Justice, and divers others; but judgment was not entered in the Roll.

Whetston's case.
4 Leon. 159, 160.
Hern. 193.
1 Anderl. 100.
Moor 130.

Paschæ 2 & 3 Ph. & Mar. Rot. 186.* in the King's Bench, Whetston's case was adjudged, that where lands were given to find an obit in such a chapel, appointing a certain sum for it, and that the residue should be employed on the reparation of the chapel, in which the obit should be celebrated; and it was adjudged that all the land was given to the King, for the one depended upon the other. And Popham, C. J. said, that *Paschæ 10 Eliz. Rot. 398.* in an information in the Exchequer the case was such; one Draiton seised of lands in London in fee, devised them to the Dean and Chapter of Paul's, upon condition that they should find two chaplains to pray for his soul in a chapel newly there built by him, and to pay to them for their salary 13 l. 6 s. 8 d. and to find an obit, appointing for it a certain sum, and to repair the chapel, and all this was found within the five years, and it was adjudged against the King; and that agrees with the opinion in the case before cited of the Dean and Chapter of Paul's before upon the proviso of this very act.

Co. Ent. 384.
pl. 14.

Partridge's and
Walker's case.
Moor 693, 694.
Hern 193.

Hill. 37 Eliz. Rot. 715. *inter* Partridge & Walker in the King's Bench, the case was; that one Hill devised certain houses in London, to the Parson and Churchwardens of the church of St. Bride's to find for ever his anniversary, appointing for it 20 s. and to pay to the poor 5 s. 6 d. *in honorem & duplicationem annorum in quibus Christus vixit in terra*: and it was adjudged, that the land was not given to the King, for the payment of the 5 s. 6 d. to the poor, *in honorem, &c.* was a good and laudable use in commemoration of the years of our Saviour, the continual memory of which is most comfortable and necessary for every christian: but it was agreed in the principal case at bar, that if the deviser had limited by express words, or by any words which might imply his intent to be, that the devisees, for the advancement of his blood, should have the residue of the profits, that would be a good use, and would save the land; and in such case the King should have but the rent. And this case was very well and at large argued by the Justices: and it was the first case that Sir Christopher Yelverton argued after he was constituted Justice of the King's Bench.

2 Rol. Rep. 206.

A C T O N ' s C a s e .

Hill. 45 Eliz.

In the Common Pleas.

THE Queen brought a *Quare impedit* against the Bishop of Peterborough, Acton patron, and Cartmel incumbent, for the church of Claycotton, being above the yearly value of 8l. The Queen declared and made title to present by lapse, *ratione acceptationis duorum beneficiorum*: the patron and incumbent severed in pleas, but both their pleas were to this effect; Anne, Baroness of Mounteagle, in her widowhood retained the said Cartmel to be her chaplain, according to the stat. of 21 H. 8. and he having the said benefice of Claycotton obtained a dispensation with confirmation of the Queen, according to the statute, and pleaded all at large, and that afterwards he accepted the vicarage of G. &c. and traversed, *absque hoc quod præd' ecclesia de G. prætextu acceptationis vicariæ de G. virtute statuti vacavit, &c.* The Queen replied, and confessed the retainer of him by the said Baroness of Mounteagle, and that he obtained the letters of dispensation *prout, &c.* but further said, that before the said Cartmel was presented to the said vicarage of G. the said Baroness of Mounteagle took to husband Henry Lord Compton, one of the Barons of the realm, and so was covert Baron, and had lost her dignity of Baroness of Mounteagle, and afterwards Cartmel the defendant accepted the said vicarage, and was thereunto admitted, instituted, and inducted, and thereupon the defendant demurred in law. And it was objected by the Queen's counsel, that the body of the act of 21 H. 8. contains a general prohibition, that if any one has a benefice of the value of 8l. that he shall not take any other benefice with cure, there if this case is not within the provisoes then the first benefice became void by the acceptance of the second; and the first proviso, which is material to this purpose, is "that every Dukes, &c. and Baroness, being widows, may have two chaplains, whereof every one of them may purchase licence or dispensation to receive, have, and keep two benefices, &c." And the second proviso material to this purpose, is, "Provided always that every

Co. Ent. 511.
pl. 21.
Moor 678.

Cap. 13.

Co. Lit. 16. b.

Antea 78. b.
Sect. 18.

Sect. 33.

" Dukes

“Duchefs, &c. and Baronefs widows, which have taken,
 “or hereafter fhall take any husbands under the degree of a
 “Baron, may take fuch number of chaplains as is above
 “limited to them, being widows, and that every fuch chap-
 “lain may purchafe licence, &c. *ut fupra*.” And it was
 ftrongly urged, that this cafe was *cafus omiffus*, and out of thefe
 provifoes for divers reafons: 1. The firft ought to be ex-
 pounded, that the Baronefs ought to be a widow as well at the
 time of the acceptance, as at the time of the retainer, for if it
 fhould be fufficient that fhe fhould be a widow at the time of
 the retainer, then the faid fecond provifo would be in vain,
 for then it would not be material whom fhe afterwards mar-
 ried, *ſc.* noble, or ignoble; but forasmuch as the makers of
 the act intended, that if fhe married after, that then fhe fhould
 be out of the firft provifo, they therefore added the fecond.
 And without queftion fhe is out of the fecond, for that pro-
 vides only when fuch noble woman marries with one under
 the degree of a Baron, and their reafon that they extended the
 laft provifo when they married under the degree of a Baron,
 was, becaufe if they married a Baron, or other fuperior de-
 gree, then the wife need not have chaplains, becaufe her
 husband might have chaplains by this act, which would be
 fufficient for both, being one perfon in law, and all of one
 family. And that the retainer and the acceptance ought to
 concur: it was faid, if a noble man, or noble woman retains
 a chaplain, and dies, the chaplain cannot take two benefices
 within this act, yet the retainer was lawful, but the perfon
 who made the retainer ought to continue when the chaplain
 accepts his fecond benefice: alfo it was faid, that it was ad-
 judged in the cafe of Ralph Earl of Weftmoreland, that where
 the faid Earl retained a chaplain, and afterwards was attainted
 of high treafon, and afterwards, and during his life, the chap-
 lain, having a benefice of the value of 8*l.* accepted a fecond
 benefice with cure, and it was adjudged that the firft benefice
 was void; for although the Earl was alive, yet the quality of
 his perfon was altered, for by the judgment he became igno-
 ble; *vide* Stamford, as if the Treafurer or Comptroller of the
 King’s houfe, &c. retains a chaplain, and afterwards is re-
 moved out of his office, now the chaplain cannot accept a
 fecond benefice, for now his quality is altered, and the caufe,
 in refpect whereof he was to have a chaplain, is removed;
 and fo when the Baronefs widow takes husband, her quality
 is altered, for now fhe is not *fui juris*, but only *ſub poteſtate*
*vir*i: and therefore, if the latter provifo had not been, if
 fuch Baronefs, after the retainer, had married with a Gent.
 under the degree of a Baron, her chaplain could not accept a
 2*d* benefice, for the quality of the Baronefs by her marriage was
 altered; and ſhe ought to remain at the time of the acceptance
 of the 2*d* benefice, in the ſame quality as ſhe was at the time
 of retainer. 2. It was objected that this cafe was out of the
 pro-

Postea 118. b.

Stanf. Cor. 195.
 b. Postea 118. b.

Co. Lit. 16. b.
 6 Co. 53. b.

proviso, because, if a Baron marries a widow Baroness, in that case the Baroness cannot retain any chaplain within the said act, for the words of the act are, "every Baroness being" widow" which exclude a feme covert Baroness; then if she is excluded to retain, by the same reason her retainer to have power by force of the act, to take a second benefice, is lost by the marriage, forasmuch as she now having married with a Nobleman, his chaplains may perform divine service to them both, and the wife of a Nobleman need not have chaplains by the judgment of the whole parliament, for the act has not made provision for any such wives, but only for a Baron's widow, or the wife of one under the degree of a Baron, who could not have any chaplain within this act; but in our case, at the time of the acceptance, she who retained was the wife of a Baron, who may have chaplains by force of this act. 3. It was said, that this act was always construed strictly against non-residency and pluralities, as a thing very prejudicial to the service of God, and the instruction of his people: and therefore, if a Bishop is translated to an Archbishopric, or a Baron is created an Earl, now he has both these dignities, and as it is commonly said *Quando duo (a) jura concurrunt in una persona, æquum est ac si essent in diversis*: but yet within this act he can have but as many as an Archbishop or an Earl may have, for although he has fundry dignities, yet he is but one and the same person to whom the attendance and service shall be done: so if a Baron is made Knight of the Garter, or Warden of the (b) Cinque Ports, he shall have but three chaplains in all, & sic de similibus: quod fuit concessum; quia difficile est ut unus homo vicem duorum sustineat. But on the other part it was argued and resolved by the court, that in the case at bar, Cartmel, after the marriage, might accept the said vicarage, within the letter and meaning of the said act, for without question the retainer of Cartmel was not determined or countermanded by the said marriage. And as to that, it was said that there are two manners of retainers: one at the common law, and according to that a man may have as many chaplains as he will: another, according to the said act, and by that he is restrained to a number; and the first which he retains are his chaplains according to the said act, and shall be first (c) preferred, as it was adjudged, *Paschæ 31 Eliz. in Con. Banco* in (d) Skeffling's Case, & Mich. 41 & 42 Eliz. in the King's Bench in (e) Drury's Case. And therefore if any officer allowed by the statute to have one, two, or more chaplains, retain a chaplain, and afterwards is removed from his office, in that case the retainer by the common law remains, but the retainer upon the statute is determined, for after the removal he cannot be non-resident, nor accept

(a) 7 Co. 14. b.
Calvin's Case.
Cawley 209.

(b) Antea 90. b.

(c) Cro. El. 724.
Antea 90. a.
1 And. 201.
(d) Antea 90. a.
89. b.
1 Ander. 201.
Moor 561, 562.
Cro. El. 723,
724, 839.
Jenk. Cent. 272,
273.
(e) Antea 90. a.

(a) Antea 117. b.

(b) Stamf. Cor.
195. b.
Antea 117. b.

(c) 2 Inst. 50.
6 Co. 53. b.
Owen 81.
Br. Nofme de
Dignity 69.
Cawly 247.

(d) Cawly 247.
2 Bulstr. 284.
2 Roll. Rep. 39.
6 Co. 53. b.

accept another benefice : so if an Earl or Baron retains a chaplain, and, before his advancement, is attainted of treason, as in the case of the Earl of (a) Westmoreland, there the retainer, according to the statute, is determined ; and after the attainder such chaplain cannot accept a second benefice, because he who is attainted, by his attainder is a dead person in law ; and now as (b) Stamf. Pla. Coron. says, from a Nobleman (by the judgment by which his blood is corrupted) he is become ignoble, and therefore his dignity is determined : and altho' the wife of a Baron, during the coverture, cannot retain a chaplain, yet when a Baronefs widow retains one or two according to the said proviso, this retainer according to the act, is the principal matter ; and as long as the retainer is in force, and the Baronefs continues a Baronefs, the chaplains may well accept two benefices by the exprefs letter of the act ; for it is sufficient if at the time of the retainer the Baronefs was a widow, for thereby the exprefs words " being a widow " are satisfied : but the statute doth not provide that she shall be a widow at the time of the acceptance, but the words imply the contrary, *sc.* that she need not continue widow ; for the words are, " every Baronefs being widow, may have two chaplains, where- " of every of them may purchase, &c." so by these words it is sufficient, if she be a widow at the time of the retainer, and the power to purchase licence is annexed to the retainer ; and there is no mischief in this case, for the number appointed by the statute shall not be exceeded, and the act appoints the Baronefs widow to have two, and her husband to have three, so that the intention of the act is not defrauded : and although (as it has been said) the husband and wife are but one person in law, yet as the text saith, *Sunt animæ duæ in carne una*, and therefore there is no reason that the retainer of chaplains which serve for the instruction of souls should be determined by the marriage. Also the last proviso, when a Baronefs marries one under the degree of a Baron, was added, because by such marriage her dignity was determined, for the rule is, *Quando (c) mulier nobilis nupsert ignobili, desinit esse nobilis*. But this rule is to be understood of a woman who attains nobility by marriage, as by the marriage of a Duke, Earl, or Baron, &c. for in such cases, if she afterwards marries under the degree of nobility, by such marriage with one who is ignoble, she loses her dignity which she had attained by marriage with one of the nobility ; for (d) *eodem modo quo quid constituitur, dissolvitur* : but if a woman is noble, as Duchess, Countess, Baronefs, &c. by descent, altho' she marries with one under the degree of nobility, yet her birthright remains, for that is annexed to her blood, and *est character indelebilis* ; but in the case at bar the Baronefs by her marriage with one of nobility, doth not lose her dignity of Baron' but *potius* augments it. And therefore it is not like any cases

cases which have been put, and the second proviso explains it, for the makers of the act well knew, that afterwards by such marriage as this is in the case at bar, she is a Baroness as she was before, and not in case as where she marries with one under the degree of nobility: to this was added, that the second proviso doth not provide remedy when a Baroness widow retains two chaplains, and afterwards marries with one under her degree, but that is left to the general construction of law, and provides only that such Baroness, after such marriage, may retain two chaplains, &c. Also when a Baroness widow retains two chaplains, and afterwards marries with a Baron, by common intendment she brings living and maintenance with her to support her state, and prefer her chaplains; and the retaining of her chaplains cannot be a prejudice to her husband, but *potius* an honour to him. If a woman Baroness widow retains two chaplains according to the statute, and afterwards take one of the nobility to husband, and afterwards the husband dies, the retainer of these two chaplains remains; and they without a new retainer may take two benefices; for their retainer was not determined by such marriage; also for the same cause, so long as they attend upon such Baroness in her house, they shall not be in danger of non-residence. And it is to be known, that if a Baron has three chaplains, and each of them has two benefices, and afterwards the Baron dies, yet they shall enjoy the benefices with cure, which were lawfully settled in them before; but although he dwells, and is resident upon one benefice, yet he shall be punished for non-residence upon the other, as it was adjudged in Parson Boyton's case, and therefore he ought to obtain of the King a *non obstante*. So if the Baron is attainted of treason or felony, or if any officer is removed from his office, & *sic de similibus*. *Pasch. 44 Eliz.* in a *Quare impedit* brought by the Queen against the Bishop of Salisbury and others, it was ruled *per totam curiam*, that the Earl of Southampton being of the age of ten years, and dwelling in the house with the Lord Admiral, to whom the Queen had granted his wardship, might retain and qualify chaplains within this act; for the words of the act are general, and yet his guardian was a Nobleman, and had chaplains by the said act allowed him, and the Earl of Southampton was under his custody, and one of his family, as the wife was in the case at bar.

Cro. Car. 145.

Note.

D U M P O R ' s C a s e .

Hil. 45 Eliz.

In the King's Bench.

Co. Ent. 684.

pl. 22.

Cr. El. 815, 816.

See 3 Wilson.
234.

(a) 1 Roll. Rep.
70, 390.
1 Roll. 422, 471.
2 Bulst. 291.
Cro. Jac. 398.

IN trespasss between Dumpor and Symms, upon the general issue, the jurors gave a special verdict to this effect: the President and Scholars of the college of Corpus Christi in Oxford, made a lease for years in *anno* 10 Eliz. of the land now in question, to one Bolde, proviso that the lessee or his assigns should not alien the premises to any person or persons, without the special licence of the lessors. And afterwards the lessors by their deed, *anno* 13 Eliz. licensed the lessee to alien, or demise the land, or any part of it, to any person or persons *quibuscunque*. And afterwards, *anno* 15 Eliz. the lessee assigned the term to one Tubbe, who by his last will devised it to his son, and by the same will made his son executor, and died. The son entered generally, and the testator was not indebted to any person, and afterwards the son died intestate, and the ordinary committed administration to one who assigned the term to the defendant. The President and Scholars, by warrant of attorney, entered for the condition broken, and made a lease to the plaintiff for 21 years, who entered upon the defendant, who re-entered, upon which re-entry this action of trespasss was brought: and that upon the lease made to Bolde, the yearly rent of 33s. 4d. was reserved, and upon the lease to the plaintiff, the yearly rent of 22s. was only reserved. And the jurors prayed upon all this matter the advice and discretion of the court, and upon this verdict judgment was given against the plaintiff. And in this case divers points were debated and resolved: 1st, That the alienat. by licence to Tubbe, had (a) determined the condition, so that the alienation which he might afterwards make, could break the proviso, or give cause of entry to the lessors, for the lessors could not dispense with an alienation for one time, and that the same estate

estate should remain subject to the proviso after. And although the proviso be, that the lessee or his assigns shall not alien, yet when the lessors licence the lessee to alien, they shall never defeat, by force of the said proviso, the term which is absolutely aliened by their licence, inasmuch as the assignee has the same Term which was assigned by their assent: so if the lessors dispense with one alienation, they thereby dispense with all alienations after: for inasmuch as by force of the lessor's licence, and of the lessee's assignment, the Estate and interest of Tubbe was absolute, it is not possible that his assignee who has his estate and interest, shall be subject to the first condition: and as the dispensation of one alienation is the dispensation of all others, so it is as to the persons, for if the lessors dispense with one, all the others are at liberty. And therefore it was adjudged, Trin 28 Eliz. Rot. 256. in *Com' Banco, inter Leeds* (a) and Crompton, that where the Lord Stafford made a lease to three, upon condition that they or any of them should not alien without the assent of the lessor, and afterwards one aliened by his assent, and afterwards the other two without licence, and it was adjudged, that in this case the condition being determined as to one Person (by the licence of the lessor) was determined in all. And (b) Popham, Chief Justice, denied the case in 16 Eliz. Dyer (c) 334. That if a man leases land upon condition that he shall not alien the land, or any part of it, without the assent of the lessor, and afterwards he aliens part with the assent of the lessor, that he cannot alien the residue without the assent of the lessor: and conceived, that is not law, for he said the condition could not be divided or (d) apportioned by the act of the parties; and in the same case, as to parcel which was aliened by the assent of the lessor, the condition is determined; for although the lessee aliens any part of the residue, the lessor shall not enter into the part aliened by licence, and therefore the condition being determined in part, is determined in all. And therefore the Chief Justice said, he thought the said case was falsely printed, for he held clearly that it was not law. *Nota reader, Paschæ* 14 Eliz. Rot. 1015. in *Com' Banco*, that where the lease was made by deed indented for 21 years of three (e) manors, A. B. C. rendering rent, for A. 6 l. for B. 5 l. for C. 10 l. to be paid in a place out of the land, with a condition of re-entry into all the three manors, for default of payment of the said Rents, or any of them, and afterwards the lessor by deed indented and inrolled, bargained and sold the reversion of one house and 40 acres of land, parcel of the manor of A. to one and his heirs, and afterwards, by another deed indented and inrolled, bargained and sold all the residue to another and his heirs, and if the second bargainee should enter for the condition broken or not, was the question: and it was

3 Co. Pennant's
case
3 Ed. 6 Dyer.
66. a.

(a) 1 Rol. 472.
Cro. El. 816.
Godb. 93.
Noy. 32.
4 Leon. 58.
2 Builtr. 291.

(b) Styles 317.
(c) Dy. 334. pl. 32.
Cro. El. 816.
Styles 334.
Moor 205.

(d) Co. Lit. 215. a.

(e) Dyer 308.
309, pl. 75.
5 Co. 55. b.
Moor 97, 98.

- (a) Co. Lit. 215. adjudged, that he should not enter for the (a) condition broken, because the condition being entire, could not be apportioned by the act of the parties, but by the severance of part of the reversion it is destroyed in all. But it was agreed, that a condition may be (b) apportioned in two cases. 1. By act in law. 2. By act and wrong of the lessee. By act in law, as if a man seised of two acres, the one in fee, and the other in (c) borough English, has issue two sons, and leases both acres for life or years rendering rent with condition, the lessor dies, in this case by this descent, which is an act in law, the reversion, rent, and condition are divided. 2. By act and wrong of the lessee, as if the lessee makes a seoffment of part, or commits waste (d) in part, and the lessor enters for the forfeiture, or recovers the place wasted, there, the rent and condition shall be apportioned, for none shall take advantage of his own wrong, and the lessor shall not be prejudiced by the wrong of the lessee: and the Lord Dyer, then Chief Justice of the Common Pleas, in the same case, said, that he who enters for a condition broken, ought to be in of the same estate which he had at the time of the condition created, and that he cannot have, when he has departed with the reversion of part: and with that reason agrees Litt. 80. b. And *vide* 4 & 5 Ph. & Mar. Dyer (e) 152. where a proviso in an indenture of lease was, that the lessee, his executors or assigns, should not alien to any person without licence of the lessor, but only to one of the sons of the lessee: the lessee died, his executor assigned it over to one of his sons, it is held by Stamford and Catlyn, that the son might alien to whom he pleased, without licence, for the condition, as to the son, was determined, which agrees with the resolution of the principal point in the case at bar. 2. It was resolved, that the statutes of 13 Eliz. cap. 10. & 18 Eliz. cap. 11. concerning leases made by Deans and Chapters, colleges, and other ecclesiastical persons, are (f) general laws whereof the court ought to take knowledge, although they are not found by the jurors, and so it was resolved between Claypole and Carter in a writ of error in the King's Bench.
- (a) Co. Lit. 215. a.
Cro. Jac. 390.
5 Co. 55. b.
- (b) 3 Bulstr. 154.
Co. Lit. 215. a.
- (c) 1 Rol. Rep. 331.
Co. Lit. 215. a.
- (d) 1 Rol. Rep. 331.
Moor 203.
- (e) Dy. 152. pl. 7.
Co. Lit. 215. a.
Cro. Eliz. 757, 816.
- (f) Antea 76. a.
1 Rol. 465.
Yelv 106.
Doct. pl. 337, 338.
Noy 124.
2 Brownl. 208.
Cro. El. 816.
Moor 593.
1 Leon. 306, 307.

BUSTARD'S Case.

Pasch. 1^o Jacobi.

MICH. 44 Eliz. in the King's Bench, in trespass between Bustard, plaintiff, and Boulter, defendant, the case was such; Jasper Dormer and Justine his wife, were seised of the moiety of the manor of Ilbury to them and to the heirs of the body of Jasper; Jasper levied a fine thereof to one Gregory, who suffered a common recovery, in which Jasper was only vouched, and he vouched over the common vouchee, and it was to the use of Gregory and his heirs, who thereof enfeoffed Bustard, who thereof enfeoffed Savage and Darston in fee; and afterwards an exchange was made by deed indented between Savage and Darston of the one part, and Bustard (who was seised in fee of the fourth part of the manor of Barton in the county of Oxford,) by which exchange Bustard gave the said Savage and Darston, and their *heirs, the said fourth part of the manor of Barton in exchange for the moiety of the manor of Ilbury, which moiety Savage and Darston gave to Bustard and his *heirs in exchange for the said fourth part of the manor of Barton; which exchange was executed on both parties: Savage and Darston demised the fourth part of the manor of Barton to the defendant for years, Jasper died, Justine his wife entered into the manor of Ilbury, upon which Bustard entered into the fourth part of the manor of Barton; the defendant re-entered, and Bustard brought an action of trespass. And after many arguments at the bar and bench in divers several terms, it was adjudged for the plaintiff, and in this case four points were resolved *per totam curiam*. 1. That in every exchange lawfully made, this word (b) *excambium* implies in itself *tacite* a condition, and also a warrantry, the one to give re-entry, and the other voucher and recompence, and all in respect of the reciprocal consideration, the one land being given in exchange for the other; but (c) it is a special warranty, for upon the voucher, by force of it, he shall not recover other land in value, but that only which

(a) Cr. El. 902,
917. Yelv. 8.
Moor 665.
3 Salk. 158.
3 Co. 6. Cupple-
dike's case. N.B.
as to the recovery.

* Co. Lit. 10. 4.

(b) Co. Lit. 50. b.
51. b.
Perk. Sect. 253.
9 E. 4. 21. b.
1 Rol. 814.
Co. Lit. 384. a.
F. N. B. 155. b.
Perk. Sect. 261.
12 H. 7. a. b.
45 E. 3. 20. b.
(c) Co. Lit. 384.
a. b.
3 Wilson 489,
— was to 496.

was by him given in exchange; for inasmuch as the mutual consideration is the cause of the warranty, it shall therefore extend only to land reciprocally given, and not to other land; and this warranty runs only in privity, for none shall (a) vouch by force of it but the parties to the exchange, or their heirs, and no assignee; but the assignee shall (b) rebut by force of it, although the exchange was without deed, as appears 3 E. 3. Formedon 44. 2 E. 2. *Cui in vita* 17. * The same law in case of partition: and as it is in case of warranty, so it is in case of a condition, which the law implies upon the exchange: and therefore if A. exchanges with B. and B. aliens to C. who is evicted by title paramount, C. shall not enter upon the other, for as the warranty runs in privity to the parties to the exchange and their heirs, so also the condition in law runs also in privity, and doth not extend to the assignee, and so none (c) shall have *contra formam feoffamenti* but the feoffee or his heirs, but the assignee may rebut; *vide* F. N. B. 163 c. 22 H. 6. 50 b. 35 H. 6. 7. a. 10 H. 7. 11. (d) But in the same case, if A. who did not alien is evicted, he shall re-enter into the land which he gave in exchange, although B. has aliened it over. 2. It was resolved, if A. gives in exchange three acres to B. for other three acres, and afterwards one acre is evicted from B. in that case the whole exchange is defeated, and B. may enter into all his land; for although the exchange had been good if A. had given but two acres, or but one acre or less, yet so far as all the three acres were given in exchange for the others, and the condition, which was implied in the exchange, was entire, upon the eviction of one acre the condition in law was broken, and therefore entry given into the whole; for it is the office of the condition to defeat the whole, and not any parcel, unless the condition is especially restrained to one part only, as it is not in this case: and therefore there is not any difference between a thing entire as a manor, and things several given in exchange: the same law of a partition, as it is also agreed in 15 E. 4. 3. & 42 Aff. 22. the Earl of Pembroke's case, where the principal case of the partition is good law, but the opinion of Cavendish there, that is to say, that although an estate for life or in tail is evicted against one coparcener, that yet the partition shall remain in force, † is not law; as it was resolved by the court in this very case, *vide* Littleton *cap.* Parceners 58. b. But in the said case of the exchange, if one is impleaded for one acre, and he vouches the other, and the demandant recovers, in that case the tenant shall recover in value but only according to the loss: for although the condition is entire, and extends to all, yet the warranty upon the exchange may severally extend

(a) Co. Lit. 384. b. 174. a.
F. N. B. 135. b.
(b) Co. Lit. 383. b.
* Co. Lit. 173. b.
174. a. 384. a. b.

(c) 9 Co. 34. a. b.
2 Inst. 118.

(d) Perk. Sect.
286, 287. 15 E. 4.
45 Ed. 4. 20, 21.
Br. Exchange 12.

Co. Lit. 173. b.
174. a. 4 H. 7. 6.
a. b.

1 Co. 86. b.

Yelv. 8.
Co. Lit. 174. a.
† Co. Lit. 174. a.
173. b.

Lit. Sect. 262.

to part; and there is great difference between warranty in law upon exchange, and warranty in law upon partition, as to the recovery in value; for in case of exchange, he who vouches shall recover in value according to the value which he lost, but so it is not in the case of partition: for if a man is seised of six acres in fee, every one of equal annual value, and dies, having issue two daughters, and upon partition each has three acres, and afterwards one sister is impleaded for one acre by one who has title paramount, and prays in aid of her coparcener, she shall not recover an acre, but half an acre, so that each of them shall have an equal part; for inasmuch as both claim by descent, which is an act in law, and by the law each of them ought to have an equal part of the inheritance of her ancestor, for this cause she shall recover in value but the moiety which she lost, so that the loss shall be equal. So if a man is seised in fee or in tail of three acres, each of equal yearly value, and dies, the heir endows the wife of the third acre, and afterwards the wife is impleaded by one who has title paramount, and she vouches the heir; now she shall not recover in value according to that which she lost, but the third part of the two acres which remain, for by the law she ought to have in dower the third part, and now upon the matter she is to have in dower but the third part of the two acres, as appears by the book in 5 E. 3. Vouch. 249. where the principal case was, Robert de Paris, great grandfather, Stephen de Paris, grandfather, Robert de Paris father, and Robert de Paris the son; Robert, the great grandfather, having to wife Maud, seised of certain land in fee, gave it to Stephen, and the heirs of his body, who died; Robert, the son of Stephen endowed Margery the wife of Stephen, of the third part of the whole; and afterwards Robert, the great grandfather died, and Robert the father died, Maud late the wife of the great grandfather brought a writ of dower against Margery wife of Stephen, and she vouched Robert the son of Robert, who had the reversion, and there the question was, of how much Margery should have in value; and by some she shall only have dower, having regard to the two parts which remain, because the dower which Maud the wife of the great-grandfather demanded, is higher and elder than the dower of Margery the wife of the grandfather. And notwithstanding the great grandfather survived Stephen, and the wife of Stephen in the life of Robert the great grandfather, was lawfully endowed, at which time Maud could demand nothing, yet when her husband died her title of dower is more worthy. And some held the contrary, *sc.* that the wife should recover in value according to her loss; and a difference was taken between dower of the wife of an heir and of the wife of a purchaser; for if there be grandfather, father, and son, and the grandfather dies, and afterwards the father dies, and the son endows the wife of the father, against whom the wife of the grandfather brings dower,

Co. Lit. 173, 174.

a. 384. a.

2 Roll. 773.

Co. Lit. 31. a. b.

Co. Lit. 31. b.

Co. Lit. 174. a.
Yelv. 8.
1 Roll. 815.

1 Roll. 813.

Co. Lit. 174. a.
Ch. El. 902.

Co. Lit. 50.

she shall not recover over in value, because the dower of the wife of the grandfather tolled in law the descent as to the freehold, and she shall be *in* of the estate of her husband, and *per consequens* after the death of the wife of the grandfather, the wife of the father shall not be endowed of the part assigned to the grandmother for her dower, for now in judgment of law the father had but a reversion of that part expectant upon an estate for life, & *ideo, dos de dote peti non debet*. But in that case the great grandfather made a gift in tail to Stephen, so that Maud demanded dower against Margery, who was the wife of a purchaser, and although Maud recovered dower against Margery, yet if Margery survived her, she should re-enter; for dower tolled the estate which by law descended, but not the estate acquired and gained by purchase, and so was it adjudged, and there Margery recovered generally to the value which she lost: so in case of exchange, each party is a several purchaser, and each warrants the whole to the other, and therefore he shall recover to the value which he loses. 3. It was resolved, that as when the whole estate in part is evicted, the whole exchange is defeated: so in the principal case, when the estate of freehold for the life of Justine, which is but parcel of the estate, is evicted in all the lands, or in part, by *that* the whole exchange may be defeated by force of the condition in law; for although a reversion expectant upon an estate for life may be given in exchange for land in possession, yet when Savage and Darston in the principal case were seised of the moiety of the said manor of Ilbury in their demesne as of fee, and gave it in possession to Bustard in exchange, *ut supra*, when Justine entered and evicted an estate for life, Bustard might enter into the whole land which he gave in exchange, for the whole estate which was given to him, was the consideration that he departed with his land, and therefore when any estate of freehold is evicted from him by entry, or otherwise, he may by force of the condition in law enter into the land given by him: so if he in reversion in fee disseises his lessee for life, and gives this land in exchange to another for other land, and afterwards the lessee for life enters, now may the other enter into his land, because the whole exchange is defeated; but if A. who has the reversion in fee of an acre of land expectant upon an estate for life, makes an exchange with B. by deed indented, and gives this acre by the name of an acre of land, and not by the name of the reversion in exchange for another acre; in this case, although B. expects to have the acre so given him in possession, yet in this case (so far as nothing past by the gift of the acre of land but the reversion) the warranty or the condition cannot by the law extend to more than passed by force of the exchange, for they are incident and annexed to the estate which is given, and cannot extend to the freehold which was in the lessee; and if the law should be otherwise, great mischief

mischiefe would ensue; for if exchange is made of divers manors, and peradventure divers parcels of them are in lease for life, in this case, if the exchange should be void because it was made as of a manor in possession, it would avoid all such exchanges, which would be mischievous; and there can be no mischief on the other part; for when the tenants for life are in possession of the land, it shall be accounted the laches and folly of the purchaser, if he did not know it either by survey or other intelligence. But in the principal case, by the fine and recovery, and other estates made, the estate, which Justine had, was divested, and she had but a right, so that Savage and Darston, who gave it in exchange, had an estate in fee-simple in possession, to which the warranty and condition in law upon the exchange, was annexed. 4. It was resolved, that although Bustard had notice of the right of Justine at the time of the exchange, yet it was not material, but that afterwards by her entry the exchange shall be defeated, for peradventure it was one of the causes that he would not purchase Ilbury absolutely but by way of exchange, so that upon eviction he shall have his own land again. And Coke, the Attorney-General, and Tanfield and Darston were of counsel with the defendant, and Godfrey, Yelverton, and others, with the plaintiff.

[See 2 Blackst. Com. ch. 20. fol. 323.]

BEVERLEY's Case of *Non Compos Mentis.*

Pasch. 1^o Jacobi.

In the King's Bench.

Carth. 436.
Skin. 77, 576.
Lucas 161.

(a) Jenk. Cent.
40. F. N. B. 202.
D. F. N. B. 204.
a. 1 Roll. 2.
Br. Fairs 62.
Fitz. Issue 53.
Cr. El. 398, 622.
Godb. 302.
Co. Lit. 247. a.
b. Br. Dum fuit
inf. ætatem 3.
Br. Entie con-
geable 47.
Lit. 95. a. b.
Lit. Sect. 405.

(b) 3 Co. 23. a.
8 Co. 42. b.
Co. Lit. 271. a.
1 Jones 32.
2 Inst. 516, 517.

IN a bill depending in the court of Requests, between Snow, plaintiff, and Beverley, defendant; the matter was, that Snow had made a bond to the defendant in 1000l. and in the said court would be relieved, because at the time of the making of the said bond, he was *non compos mentis*; and this term I moved the court of King's Bench to have a prohibition to stay the said suit in the court of Requests, because the matter was not determinable there. And upon this case two points upon argument and on good consideration, were unanimously resolved *per tot. cur.* 1. That every deed, feoffment, or grant, which any man *non compos mentis* makes, is avoidable, and yet shall not be avoided by himself, because it is a maxim in law, that no man of full age shall be in any plea to be pleaded by him, received by the law to (a) stultify himself, and disable his own person, as appears by Littleton, lib. 2. cap. Discents, fol. 95. and therewith agree 39 H. 6. 42. b. 5 E. 3. 70. & 35 Aff. 10. And there another cause is given, *sc.* because when he recovers his memory, he cannot know what he did when he was *non compos mentis*. 2dly, If the common law had given a writ of *Non compos mentis*, to him who has recovered his memory after alienation, certainly the law would have given him remedy for the maintenance of himself, his wife, children, and family, although he recovered not his memory, but continued *non compos mentis*. And it must be known, that this disability to disable himself as to some persons, is personal, and extends only to the party himself; and as to other persons, is not personal, but shall bind them also: and as to *that*, know that there are four manner of privities, (b) *sc.* privity in blood, as heir: 2. Privity in representation, as executors,

or

or administrators, who as Littleton saith, fol. 77. b. represent the (a) person of the testator or intestate, 2 Mar. Dyer 112. agrees. 3. Privy in estate, as a gift in tail, the reversion or remainder in fee, &c. 4. Privy in tenure, as lord by escheat: and two of them, which are privies only, may disable him who was *non comp' mentis*, and shall avoid his deeds, grants, or feoffments, and two not. For privies in blood may shew the disability of the ancestor; and privies in representation the infirmity of the testator or intestate; but neither privy in (b) estate, nor privy in tenure shall do it: and therefore if donee in tail being *non compos mentis*, makes a feoffment in fee, and dies without issue, he in reversion or remainder shall not enter or take advantage of the insanity of the donee: the same law of lord by escheat, if his tenant being *non compos mentis*, makes a feoffment in fee, and dies without heir, he shall not avoid it: but there are some acts done by a man *non comp' mentis*, which none of them shall avoid; and therefore, if he levies a fine, or suffers a recovery, (c) or acknowledges a statute or recognizance, neither his heir nor his executors shall avoid it, for these are matters of record which shall not be avoided by a bare averment of *non compos mentis*, for the inconvenience which may thence ensue: also such averment is against the office and dignity of the Judge, for he ought not to take any consueance of a fine or recognizance of him who is *non compos mentis*, 18 E. 2. Fines 120. 17 Aff. 17. 17 E. 3. — 1 Mar. tit. *Dum fuit infra ætat'* 7. 31 E. 3. *Saver Default*, (37) 57. 2. It was resolved, that it being against an exprefs maxim of the common law, that the party shall not (d) disable himself, that he shall not have for it relief in any court of (e) equity, for that would be in subversion of a principle and ground in law, *quod nota*. And Coke the King's Attorney, was of counsel with Beverley, and Herle, the King's Serjeant, with Snow. *Nota* reader, that every act which a man *non compos* doth, either concerns his life, his lands, or his goods; also every act which he doth, is either in *pais*, or in a court of record: all acts which he doth in a court of record, either concerning his lands or goods, shall bind himself and all others for ever; all acts which he doth concerning his lands or his goods in *pais*, in some case shall bind himself only during his life, and in some case shall bind for ever (as has been said). But as to his (f) life, the law of England is, that he shall not lose his life for felony or murder, because the punishment of a felon is so grievous, *sc.* 1. To lose his life. 2. To lose his life in such odious manner, *sc.* by hanging, for he shall be hanged between heaven and earth as unworthy of both. 3. He shall lose his blood as to his ancestry (for he is as a son of the earth without any ancestor) and as to his

(a) Lit. sect. 337.
Co. Lit. 208. b.
209. a.

(b) 8 Co. 43. a.
1 Roll. Rep.
401, 442.
3 Bulstr. 272.
2 Inst. 483.

(c) Br. Fines levy,
&c. 75.
2 Inst. 4.
12 Co. 123, 124.
Cr. El. 187.
Co. Lit. 247. a.
Perk. sect. 24.

Cases in law,
&c. 161.
(d) Jenk. Cent.
40. Cr. El. 398.
F. N. B. 202. d.
1 Roll. 2.
Br. Fairs 62.
Fitz. Issue 53.
Godb. 302.
Co. Lit. 247. a.
b. Br. Dum fuit
infra ætat. 3.
Br. Entry con-
geable 47.
Lit. sect. 405.
Lit. 95. a. b.
(e) 1 Roll. Rep.
210.

(f) 2 Roll. Rep.
547.
Hob. 134.
Plow. 19. a.
2 Roll. Rep. 327.
Co. Lit. 247. b.
21 H. 7. 31. b.
Br. Corone 61.
Stamf. Cor. 16. b.
Fitz. Cor. 351,
412, 414.
Went. 302.
Godb. 316.
(g) Co. Lit. 47.
a. 1 Roll. Rep.
180, 187.
3 Inst. 210, 211.
Plow. 387. b.
Stamf. Cor. 182,
a. b.

his posterity also, for his blood is corrupt, and he has neither heir nor posterity. 4. His lands. 5. His goods; and in such case the King shall have *annum, diem, & vestrum*, to the intent that his wife and children shall be ejected, his houses pulled down, his trees eradicated and subverted, his meadows (a) ploughed, and all that he has for his comfort, delight, or sustenance, wasted and destroyed, because he has in such felonious manner offended against the law; and all this was, *ut (b) pœna ad paucos, metus ad omnes perveniat*: but the punishment of a man who is deprived of reason and understanding, cannot be an example to others. 2. No felony or murder can be committed without (c) a felonious intent and purpose; *et ideo dict' est feloniam, quia fieri debet felleo animo*: but *furiosus non intelligit quid agit, & animo & ratione caret, & non multum distat a brutis*, as Bracton saith, and therefore he cannot have a felonious intent. *Vide 21 H. 7. 31. 26 Aff. 27. F. N. B. 202. D. Stamf. Pl. Coron. 16. b.* Also for the same reason, *non compos mentis* cannot commit petit treason, as if a woman, *non compos mentis*, kills her husband, as appears 12 H. 3. Forfeiture 33. But in some cases *non compos mentis* may commit high (d) treason, as if he kills, or offers to kill the King, it is high treason, for the King *est caput & salus reipublicæ, & a capite bona valetudo transit in omnes*; and for this reason their persons are so sacred, that none can offer them any violence, but he is *reus criminis læsæ Majestatis, & pereat unus ne pereant omnes*. And it must be known, that there are four * manners of *non compos mentis*: 1. Idiot or fool natural: 2. He who was of good and sound memory, and by the visitation of God has lost it: 3. *Lunaticus, qui gaudet lucidis intervallis*, and sometimes is of good and sound memory, and sometimes *non compos mentis*: 4. By his own act, as a drunkard; and it has been said, that there is great difference between an idiot *a nativitate*, and he who was of sound memory, and becomes, by the visitation of God, of unsound memory; for an idiot is known by his perpetual infirmity of nature, *a nativitate*, for he never had any sense or understanding to contract with any man; but he who was of good memory and understanding, and able to make a contract, and afterwards becomes by infirmity or casualty, of unsound memory, is not so well known to the world as an idiot natural. Also an idiot in an action brought against him shall appear in proper (e) person, and he who pleads best for him, shall be admitted, as appears in 33 H. 6. 18. b. Otherwise it is of him who becomes *non compos mentis*, for he shall appear by guardian if he is within age, and by attorney if he is of full age; but yet as to estates or gifts made by them, they themselves, by any plea that they can plead, shall not avoid them, no less the idiot than he who

(a) Co. Lit. 294.
b.

(b) 3 Inst. 4, 6.

(c) Plow. 19. a.
Hob. 134.
2 Roll. 547.

(d) 2 Roll. Rep.
324. Dalt. Just.
330. Hales pl.
Cor. 10. 3 Inst. 6.
Godb. 316.

* Co. Lit. 247. a.

(e) Co. Lit. 135.
b. F. N. B. 9, 27.
Br. Idiot. 1.
Stamf. Præiog.
36. a.

who becomes of unsound memory; and be the feoffment or gift made by them in person or by attorney, they themselves shall never avoid it either by entry or by action; for it appears by the said maxim, that they cannot stultify (a) or disable themselves: for if they shall avoid things which they do by attorney, they themselves ought to shew that they were then ideots, or of unsound memory: but yet as to others, there is a great difference between an estate made in person and by attorney; for if an ideot or *non compos mentis* makes a feoffment in fee in person, and dies, his heir within age, he shall not be in ward, or if he dies without heir, the land shall not escheat as is aforesaid: but if the feoffment is made (b) by letter of attorney, although the feoffor shall never avoid it, yet after his death as to all others in judgment of law, the estate was void, and therefore in such case, if his heir is within age, he shall be in ward, or if he dies without heir the land shall escheat, and that is the true reason of the books in 7 H. 4. 5. b. & 7 H. 4. 12. And like the case of an (c) infant, if he makes a feoffment in person, if he dies without heir, the land shall not escheat, but otherwise if it was made by letter of attorney, but the infant himself shall avoid it, but so shall not the others; but acts done by matter of record, as fines, * recoveries, judgments, statutes, recognizances, &c. shall bind as well the ideot, as he who becomes *non compos mentis*, (d) 31 E. 3. *Saver Default* 37. (371) 1 Mar. tit. *Dum fuit infra ætatem* 7. Also of a lunatic, all acts which he doth during his lunacy, are equivalent to acts done by an ideot, or he who is utterly *non compos mentis*; but acts done by him, *inter lucida intervalla*, when he is of sound memory shall bind him. Lastly, altho' he who is (e) drunk, is for the time *non compos mentis*, yet his drunkenness does not extenuate his act, or offence, nor turn to his avail; but it is a great offence in itself, and therefore aggravates his offence, and doth not derogate from the act which he did during that time, and that as well in cases touching his life, his lands, his goods, as any other thing that concerns him: when and in what cases laches shall prejudice an ideot, or *non compos mentis*, some have taken a difference between a bar of his right, and a bar of his entry, for in case of bar of his right, his laches shall not prejudice him; but in such special case, if he becomes of unsound memory, he shall shew that he was *non compos mentis*; as if a man *non compos mentis*, is disseised, and the disseisor levies a fine, in this case at the common law, although the year and day are past, yet he who was *non compos mentis* shall not be thereby bound, but he may well enter, and that they say is proved by the statute *de modo* (f) *levandi fines*, made anno 18 E. 1. which is but a declaration of the common law, *sc.* that a fine is so high a bar, and of so great force, and of so strong a nature in itself,

(a) Jenk. Cent. 40. Cr. El. 393, 622. F. N. B. 202. d. 1 Roll. a. Antea 123. b. Br. Faits 62. Fitz. Issue 53. Godb. 302. Co. Lit. 347. a. b. Br. Dum fuit infra ætatem 3. Br. Entry congeable 47. Lit. sect. 405. Lit. 95. a. b. (b) F. N. B. 202. e. Br. Feoffm. 8.

(c) 8 Co. 42. b. 7 Co. 7. b. 2 Inst. 483. Dy. 10. pl. 38. 49 E. 3. 13. a. 39 H. 6. 42. b. 7 H. 5. 9. b. 3 Bulstr. 272. * Antea 124. a. Cr. El. 187. Co. Lit. 247. a. Perk. sect. 24. 2 Inst. 483. Br. Fines levie, &c. 75. 12 Co. 123, 124. (d) Antea 124. a. (e) Co. Lit. 247. a. Plow. 19. a.

(f) Co. Lit. 16. 2. b. Plow. 359. b. 2 Inst. 510, 511.

self,

2 Inst. 520.
Plowd. 366. a.

Lit. Sect. 405.
† Con. Claims,
fol. 30.

self, that it bars not only those who are parties and privies to the fine and their heirs, but all other people of the world who are of full age, out of prison, and of good memory, and within the four seas the day of the fine levied, if they put not in their claim by their action or entry in the country within the year and the day; by which it appears, that no laches of a man *non compos mentis* shall bar him of his right. Also it appears by the statute of 4 H. 7. cap. 24. that in such case, if a man levies a fine with proclamations, and at the time of the fine levied, he who has right is *non compos mentis*, and afterwards he recovers his memory, in this case he ought to pursue his action, or make his entry within five years, after he becomes of sound memory, and in such case in pleading, he shall shew, that at the time of the fine levied he was *non compos mentis*, and all the special matter; but if he who has such right is an idiot, or *non compos mentis*, and never recovers his memory, the heir may have his action, or make his entry when he will, for he is excepted out of the body of the act, and is not bound to make any entry, or bring his action within any time, but the party himself, if he recovers his memory. The same law, if he who is beyond sea at the time of the fine levied, and dies, there his heir may enter, or bring his action when he will; and in such case the lord by escheat shall take advantage of *non compos mentis*, infancy, imprisonment, or being beyond sea, of his tenant: for if there are lord and tenant, and the tenant is disseised, and the disseisor levies a fine, the disseisee being then within age, or *non compos mentis*, or in prison, or beyond sea, and afterwards the disseisor takes back an estate to himself in fee, and afterwards the disseisee within age, or *non compos mentis*, or beyond sea, or in prison, dies without heir, the lord by escheat shall take advantage of every of them against the disseisor. So if a collateral warranty descends upon one *non compos mentis*, which he might have avoided by entry: but an idiot, or *non compos mentis*, by their laches shall be barred of their entry: and therefore if they are disseised, and the disseisor dies seised, it shall toll their entry; but after their death their heir may enter and take advantage of the infirmity of their ancestor; and his laches, which shall prejudice himself, shall not prejudice his heir of his entry; and all this appears by Littleton, lib. 3. cap. Descents, † fol. 95. For Littleton saith, no laches can be adjudged by the law in him who has no discretion in such case, *sc.* having regard to his heir, and so is the difference. As to that which is commonly objected, that the civil law, in this point, is grounded upon greater reason than the common law; for by the civil law, all acts which idiots, or *non compos mentis*, do without their tutor, are utterly void; and this seems to some more reasonable than the common law, because he who is an idiot,

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or *non compos mentis* wants discretion and understanding, and that comes by the act and visitation of God; therefore they say (God forbid) that his acts or laches, during that time, should bind him; others conceive, that the ancient common law agrees with the civil law in this case; for Bracton, lib. 3. fol. 100. saith, *furiosus autem stipulari non potest, nec aliquod negotium agere, quia non intelligit quod agit*: and therefore it seems unreasonable that acts done by them who have no discretion, nor the use of reason, *qui* (as Bracton saith) *non multum distant a brutis qui ratione carent*, should bind themselves; and therefore it is (as is commonly said) a great defect in law, that no tutor is assigned to them by law, who may protect them, and principally their inheritance; as to *that* it must be known, that the law of England has provided for them a tutor, and has made provision for the preservation of their inheritance, and their goods also, and therefore in the case of an idiot, or fool natural, for whom there is no expectation, but that he, during his life, will remain without discretion and use of reason, the law has given the custody of him, and all that he has, to the K. who (as F. N. B. 232. says) is bound of right by his laws to defend his subjects, and their goods and chattels. lands and tenements; and because every subject is in the K's protection; an idiot who cannot defend or govern himself, nor order his lands and tenements, goods and chattels, the K. of right ought to have him, and to order him, his lands, goods, and chattels, and this, it appears, was the common law; for Britton, fol. 16. who wrote anno 5 E. 1. saith, that if any heir is a fool natural, by which he is not able to demand and keep his inheritance, &c. that such heirs of whomsoever they hold, male or female, remain in the custody of the King, with all their inheritance; and thence it follows, that the stat. of *Prærog. Regis* cap. 9. made in 17 E. 2. long time after Britton wrote, was but a declaration of the common law, and therewith agrees 18 E. 3. *Scire facias* 10. where it appears by the said stat. *Prærog. Regis*; *quod Rex habebit custodiam terrarum fatuorum naturalium, capiendo exitus earundem sine vasso & destructione, & inveniet eis necessaria sua de cujuscunque feod' terræ illæ fuerint, & post mortem eorundem reddat eam relictis hæredib', ita quod nullatenus per eosdem fatuos alienentur, nec quod eor' hæredes exhæredentur*: upon these words I observe divers things: 1. That the law gives the K. but the custody of the lands of the idiot, that although it continues during the life of the idiot, yet having but the custody, the K. has not the freehold in him, but the freehold is in the idiot, for the statute says, *quod post mortem eorundem reddet ea relictis hæredibus*, and that appears also in 17 E. 3. 11 & 13 (31) E. 3. Saver default 37. 2. Altho' the statute says, *custodiam terrarum*, yet the K. shall have as well the custody of the body, and of their goods and chattels, as of the lands and other hereditaments, and as well those which he has by purchase, as those which he

Co. Lit. 135. b.
Stamf. Prærog.
33. b.

Co. Lit. 247. a.

Stamf. Prærog.
33. b. 34.
8 Co. 170. a.
2 Inst. 14.
1 And. 23.
Dyer 25. 26.
pl. 16. Moor 4.
29 Ed. 3. 43. b.

Stamf. Pr. 35. b.

Co. Lit. 2. b.

has

has as heirs by the common law. 3. That he ought to be an ideot *a nativitate*, *sc. fatuus naturalis*, and not by accident or infirmity. 4. That no feoffment, gift, lease, or release, that an ideot can make of his inheritance, but may be avoided during his life, which appears by these words, *ita quod nullatenus per eosdem fatuos alienentur, nec quod eorum hæredes exheredentur*: suppose then that an ideot, above the age of 21 years, makes a feoffment in fee of his inheritance, if you ask how and in what manner it may be avoided during his life? I answer, that if it is found by office at the (a) King's suit, that he was ideot *a nativitate*, and that he has aliened his lands, then upon a *Scire facias* against the alienees, the land shall be seised into the King's hands, and thereby the inheritance shall be revested in the ideot, 18 E. 3. *Sci' fac'* 10. 32 E. 3. *Sci' fac'* 106. 50 || Aff. 2. For the statute says, *quod post mortem eorum reddat eam rectis hæredib'*, which the K. cannot do, neither can the K. have the possession of the land to his own use, unless by the office and the seisure, such conveyance made by the ideot be destroyed, and that doth not impugn the said maxim of the common law. For in this case the ideot, in no plea that he can plead, shall disable (b) or stultify himself: but all this is found by office, by the inquisition and verdict of 12 men at the K's suit, who are not concluded to speak the truth, and such office, when it is found, shall have * relation *a tempore nativitatis*, to avoid all mean acts done by the ideot, as feoffments, releases, &c. and therewith agree 23 (32) E. 3. &c. *Sci' fac'* 106, & Stamf. Prærog. 34. b. F. N. B. 202. E. But notwithstanding the words of the said act are general and emphatical, *nullaten' alienentur*, yet if he aliens by fine, (c) or recovery, it shall bind him, as has been said, for the cause aforesaid; and so after such office found, all gifts made by him of his goods or chattels, and all bonds made by such ideot, are utterly void, and after such office found, if the ideot be sued in any action, upon any bond or writing that he has made, the K. by his writ (so long as the office stands in force) recitnig the office, shall send a *Superfedeas* to the Justices where the suit is commenced: but the K. shall not have the custody of the land which an ideot holds by (d) copy, for that is but an estate at will by the common law, and if the King should have the custody of it, it would be a great prejudice to the lord of the manor; but yet an alienation made by an ideot of his copyhold after office found, shall be avoided, *vide* 13 Eliz. Dyer 302. And that the K. shall have the protection of the goods (e) and chattels of an ideot, as well as of his lands, appears by F. N. B. 232. b. where he says, that if an ideot who cannot defend, or govern himself nor order his lands, tenements, goods, and chattels, the K. of right ought to have him in his custody, and to protect him and his lands, goods, and chattels; and this appears also by the writ in the *reg' de ideota inquirendo*, where it is said, *quia (f) accepimus quod J. de B. fatuus & ideota existit, ita qd' regimini sui*

(a) Jenk. Cent.
40. Co. Lit.
247. a. 8 Co.
170. a. 2 Rol.
Rep. 337.
Godb. 302.

F. N. B. 202. e.
Stamf. Prærog.
34. b.
|| Antea 56. b.
Br. Alienat. 14.
Br. Ideot. 2.
Br. Travers de
Office 22.
Antea 24.
Br. Feoffmen t
de, &c. 63.

* 8 Co. 170. a.
(b) Jenk. Cent.
40. Cr. El. 398,
622. F. N. B.
202. d. 1 Rol. 2.
Br. fairs 62.
Fitz. Issue 53.
Godb. 302.
Co. Lit. 247. a. b.
Br. Dum fuit
infra ætatem 3.
Br. Entry con-
geable 42.
Lit. sect. 405.
Lit. 95. a. b.
(c) Cr. El. 187.
Co. Lit. 247. a.
Perk. sect. 24.
Br. Fines, levies,
&c. 75.
12 Co. 123, 124.
2 Inst. 483.
(d) Hard. 434.
Stiles 21.

(e) Stamf. Pr.
36. a.

(f) F. N. B. 232.
b.

sui ipsius terrarum, tenementorum, bonorum & catallorum suorum non sufficit, & quod ipse in fatuitate sua magnam partem terrarum & tenementorum suorum alienavit, & etiam magnam partem bonorum & catallorum suorum dissipavit in exhæredationem suam, & nostri prejudicium manifestum, nos indemnitati ipsius in hac parte prospicere volentes, &c. By which it appears, that by the common law, the K. shall have as great protection of the goods and chattels of an ideot, as of his lands, and that as well the consumption of his goods and chattels, as the alienation of his lands is to be remedied and redressed by the King, to whom the law gives his custody and protection. And as after office found, he cannot alien, give, &c. so alienations, gifts, &c. made before office found, shall be avoided after office thereof found, as is aforesaid, for no laches shall be accounted in the King, nor no prejudice thereby accrue to the ideot for not suing of the office before the feoffment or gift. But if the ideot dies before office found, after his death, no office can be found, for the words of the writ are, *et ipsum viis & modis quibus super statu suo melius poteritis informari circumspicite examinaretis, &c.* which cannot be done when he is dead, and without office the King cannot be entitled, 16 E. 3. Livery 30. and then the former differences as to his lands and goods hold. The same law, if a man who was of sound memory becomes *non compos mentis*, and afterwards aliens his land, or goods or chattels, and afterwards, by office at the King's suit, it is found that he was *non compos mentis*, and that he has aliened, &c. the King shall protect him who cannot protect himself, as is aforesaid, and shall take the profits of his lands, and of all that he had (which the King could not do if his alienation or gift should stand) and therewith maintain him and his family, but the King shall not take any part of the said profits to his own use; and all this appears by the stat. of *Prærog. Reg. cap. 10.* which was but a declaration of the common law; *item Rex providebit, &c. Et nota* that the said words of F. N. B. 232. that the K. is bound of right by his laws to defend his subjects, and their goods and chattels, lands and tenements, extend as well to *non compos mentis*, as to an ideot; but in case of *non compos mentis*, the King has not any interest in the lunatic (as he has in the ideot) because the lunatic may recover his memory which he has lost, and therefore in the case of the ideot, the law says, *Rex habebit custodiam*, but in the case of *non compos mentis*, *Rex providebit*. And as to alienation made by *non compos mentis*, the words are all one as they are in the case of the ideot, *sc. ita quod prædictæ terræ & tenementa infra prædictum tempus nullatenus alienentur*, and therefore after the office found thereof, the alienation, gift, &c. of him who is *non compos mentis*, are in equal case with the alienation or gift of an ideot, and the said words of the said writ in the register, *quia accepimus quod J. de B. fatuus & ideota existit, &c.* extend as well to *non compos mentis*, as to a fool natural,

for

8 Co. 170. a.

Stamf. Prærog.

34. a.

Godb. 321.

Dyer 26. a.

Stamf. Prærog.

36. b.

2 Sid. 124.

17 E. 2 cap. 9;

10.

F. N. B. 232. b.

for afterwards, in the same writ, it is said, *diligenter inquiras si idem J. fatuus & ideota sit necne, & si sit tunc utrum a nativitate sua, an ab alio tempore, & si ab alio tempore, tunc a quo tempore & qualiter & quomodo, & si lucidis gaudet intervallis & si idem J. in eodem statu existens terras aut tenementa aliqua alienavit necne, &c.* So that it appears that in judgment of law, *fatuus & ideota* include as well *non compos mentis*, as *ideota a nativitate*, and therefore they are in the same case, as to the alienation of their lands and tenements, goods and chattels. Hil. 28 H. 8. Rot. 401. in C. B. the case was; in trespass *quare clausum fregit*, and cut his trees in Paddington, in the county of Middlesex, *per Johan' Frauncis versus Will' Holmes*, the defendant pleaded, that it was found by office before the escheator in the said county of Middlesex, that the said Jon Frauncis was a lunatic, &c. and that he was seised in fee of the land in which, &c. wherefore the King seised his person, and his land, and by his letters patent granted the rule, custody and government of the same person and of his lands, to the said Holmes, *quamdiu* that the person was lunatic, to take the profits to his own use, and so justified, and prayed in aid of the King, and thereupon it was demurred in law, if he should have aid or not. And it was adjudged, that he should not have aid of the King, for this grant was utterly void, for the King is bound to keep the said lunatic, his wife, children, and household, with the profits of the land, and without taking any thing to his own use, but all to the use of the *non compos mentis* and his family, and all this to the intent that the King may provide, that he who wants reason shall not alien his lands, nor waste his goods; and the King, after office found, has only provision, and has not any custody or possession of the body or lands of one *non compos mentis*, as he has of an ideot, and he has nothing to grant over: but if the King provides one to have care and charge, that he who is *non compos mentis*, and his family shall be maintained, and that nothing shall be wasted; or if one, of his own head, takes so much upon himself, in this case he is but as Bailiff of him who is *non compos mentis*, and shall be accountable as Bailiff to him who is *non compos mentis*, or to his executors or administrators; and he cannot cut down trees but for necessary housebote, ploughbote, and cartbote, and to repair ancient pales, and all that which a Bailiff may do, he may do, and not otherwise. And therewith agrees a writ in the Register directed to the Sheriff, *diligenter inquiras utrum J. de B. a nativitate sue tempore semper hactenus purus ideota existit, per quod custodiam terrarum & tenementorum suorum in C. ad nos debeat pertinere, an per infortun' vel alio modo in hujusm' infirmitat' postea inciderit, propter quod hujusmodi custodiam ad nos pertinere non debeat.* And so by these differences annexed you will understand your

1 Anderf. 23.
Moor 4.
N. Bendl. 17, 18.
Dy. 25, 26. pl.
164.

Hutt. 16.

your books, 18 E. 2. Fines 120. 3 E. 3. Tit. entry congeable Statham. 3 E. 3. Formedon — 5 E. 3. 70. 10 E. 3. Scire facias 10. and as well 32 E. 3. Scire facias 106. 17 Aff. 17. 17 E. 3. 11. 25 Aff. 4. 35 Aff. 10. 50 Aff. 2. 9 H. 6. 6. 39 H. 6. 24. (42) 12 E. 4. 8. F. N. B. 202. & Stamf *Prærog.* 34. *Braet. lib. 2. fol. 11, 12. & lib. 3. fol. 100.* Britton, fol. 66. Brooke Tit. *Dum fuit infra ætatem* 9. and divers writs in the Register, fol. — and which are agreeable with the true reason of the common law. *Nota*, reader, *ideota* sive *ideotes*, is a Greek word, and properly signifies a private man, who has not any public office: *apud Latinos accipitur* for illiterate and simple; *apud jurisperitos nostros*, *Non compos mentis*; *apud Anglos*, in common speech, a natural fool: *fatuus proprie dicitur a fando, quia fatur qd' puer primo fatur, id est, quia inepte loquitur; sed apud jurisperitos nostros accipitur pro Non compos mentis, & fatuus dicitur qui omnino desipit: Stultus dicitur a stupore, quia stultus est qui propter stuporem movetur; levius est esse stultum quam fatuum, sc. imprudens, improvidus, ignorans mali & boni. Insanus qui abjecta ratione omnia cum impetu & furore facit. Amens ab (a) quæ est particula privativa, & mente, id est consilio & animo. Demens, est qui non cogitat quid agit aut loquitur, (de) est particula privativa: amens qui prorsus insanit; Arist. 7. Ethicorum, umentes dicuntur qui a natura experti rationis solum sensuum munus exequuntur.*

Co. Lit. 246. b.
247. a. b.

Co. Lit. 246. b.

F I N I S.

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